Supreme Court, U.S.
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No. 01-685

In The

Supreme Court of the United States

K. DANIEL RUPP,

Petitioner,

v.

DAVID PHILLIPS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Tenth Circuit correct to hold that Respondent's interest in providing efficient and effective legal representation to indigent clients (and in maintaining the integrity of the FPD's office) outweighed Petitioner's unnecessary, deceptive, and disruptive involvement in an FBI investigation?

2. Was the Tenth Circuit correct to hold that, by Petitioner's own sworn testimony, there was no genuine issue of material fact that would preclude Summary Judgment?

PARTIES TO PROCEEDING

The parties to the proceedings below were the Petitioner K. Daniel Rupp and the Respondent David Phillips.

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STATEMENT OF THE CASE

This is an individual capacity, First Amendment, free speech *Bivens* case. The case arises out of the 1998 termination of Petitioner K. Daniel Rupp (hereinafter referred to as "Rupp" or "Petitioner"), a former employee of the Wichita, Kansas, office of the Federal Public Defender ("FPD"). Petitioner was terminated by Respondent David Phillips ("Phillips" or "Respondent"), the FPD for the District of Kansas, because of Petitioner's deceptive and disruptive behavior. Petitioner filed suit against Respondent solely in his individual capacity.

In his Writ, Petitioner states that he reported to the FBI what he believed to be a "real and imminent threat to public safety" by Timothy Tobiason. Writ, at pg. 2. Petitioner then "communicated with Tobiason, attempting to persuade him not to resort to drastic measures." *Id.* In this context, Petitioner incorrectly states that he "was terminated by Respondent Phillips, on the grounds that these communications violated an order prohibiting Rupp's cooperation with the FBI." *Id.* This statement is a glaring mischaracterization of the facts – a tactic that fooled neither the district court nor the Tenth Circuit Court of Appeals.

Petitioner would have the Court believe that his initial report to the FBI regarding Tobiason was one of the bases for his termination. Nothing could be further from the truth. Petitioner himself testified that he was commended by Phillips for reporting Tobiason's threats to the FBI. Thereafter, Petitioner was simply and unequivocally instructed that he could not continue to be involved in any FBI investigation because of the inherently adversarial relationship between the FPD and the FBI.

Petitioner attempts to create an issue of fact regarding the instructions he received; he contends that Respondent told him only that he could not be a witness for the FBI. The uncontroverted evidence does not support Petitioner's contention. Petitioner admits that he was instructed that he could not be – and promised the FPD that he would not be – involved in an FBI investigation of Tobiason. Petitioner also admits that he was told that he could lose his job if he participated in the FBI investigation. Petitioner promised the FPD that he would not be involved in the investigation. Despite his assurances to the contrary, Petitioner intentionally deceived Respondent by actively and surreptitiously participating in the FBI investigation during the summer of 1998. As a result, he was fired.

Petitioner's deliberate actions disrupted the operations of the FPD by creating a conflict of interest, a breach of trust, and an atmosphere where Petitioner could not be trusted to do what he was told or to keep sensitive information confidential. Respondent reasonably made the decision to terminate Petitioner's employment.

The District Court granted Respondent's Motion for Summary Judgment as to all of Petitioner's causes of action. The Tenth Circuit Court of Appeals affirmed, holding that Respondent's "substantial" interests outweighed those of Petitioner under the *Pickering* balancing test. The Tenth Circuit did not address the issue of qualified immunity.

For the reasons discussed below, none of the issues raised in Petitioner's brief have merit. The grant of Summary Judgment to Respondent was justified based on the uncontroverted facts presented to the Court.

A. Facts Material to this Court's Consideration of the Questions Presented.

The Federal Public Defender, the FBI, and Petitioner.

The Federal Public Defender ("FPD") "exists to ensure that the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act, and other congressional mandates is enforced on behalf of those who cannot afford to retain counsel and other necessary defense services." (Resp. App. 70.)

Petitioner began his employment as an investigator for the Wichita Office of the FPD in December 1994. (Resp. App. 1.) At all times, Petitioner was an at-will employee. (App. F-13, ¶ 82.) At the time in question, his immediate supervisor was Cindy McNorton, who reported to David Phillips, the Federal Public Defender for the District of Kansas. (Resp. App. 1-2, 71.) In Petitioner's job as FPD investigator, he was to investigate allegations of crimes made against the individuals defended by the FPD. (Resp. App. 30-31.)

The Federal Bureau of Investigation ("FBI"), on the other hand, is a law enforcement agency of the federal government that performs investigations to collect facts and evidence for use by the U.S. Attorney's office in prosecution of federal crimes. (Resp. App. 40.) The FBI employs approximately 27,000 people in offices in the United States and around the world; its annual budget is in the billions. (Resp. App. 37.) The FPD and the FBI are generally adversarial as the FPD often defends the individuals who the FBI has investigated on behalf of the U.S. Attorney, the prosecutor. (Resp. App. 35-36.)

At the time in question, the FPD had in effect its Personnel Policies and Procedures Manual ("Manual"), the purpose of which was to "provide a written guideline

of personnel benefits and responsibilities as well as clear definition of general office policies." (Resp. App. 69.) Petitioner received and signed off on a copy of the Manual. (Resp. App. 2.)

The Manual contains the Code of Conduct for all Federal Public Defender employees. (Resp. App. 72-73.) This code states: "In assessing the propriety of one's proposed conduct, a defender employee should take care to consider all relevant canons in this code, the Ethics Reform Act, and other applicable statutes and regulations." (Resp. App. 73.)

Petitioner Becomes Acquainted with Tobiason.

Petitioner "is an avid gun collector and frequented area gun shows in his spare time." (App. F-2, ¶ 7.) Sometime in early to mid 1997, Petitioner became acquainted with Timothy Tobiason, a vendor who had an interest in, and was selling printed materials on, the design and manufacture of biological and chemical weapons. (App. F-2, ¶ 8-9.) Petitioner again met with Tobiason at a gun show in Wichita, Kansas, on June 6, 1998, when Tobiason made statements suggesting that he had actually created nerve agents in small quantities.[1] (App. F-3, ¶ 15, F-6, ¶ 20.)

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[1] FBI Agent Paul Vick specifically testified that it is illegal "to generate biological agents and then to threaten or to kill or harm people. It has to be a combination of both." Therefore, creating nerve agents is not "a violation of the law." (Resp. App. 34.)

Respondent Commends Petitioner for Providing Information to the FBI; Specific Instructions Given.

On June 8, 1998, Petitioner contacted the Alcohol, Tobacco & Firearms Bureau regarding Tobiason. (Resp. App. 4-5; App. F-7, ¶ 29.) Petitioner was referred to the FBI where he met with Agent Vick and discussed his conversations with Tobiason. *Id.* They also discussed possible scenarios in which Rupp would get more information from Tobiason. (Resp. App. 20-21.) These conversations with Vick occurred before Petitioner discussed the situation with anyone at the FPD's office. (Resp. App. 14.)

On Tuesday, June 9, 1998, Sharon Aldridge, an assistant paralegal in the Wichita FPD's office, called McNorton and asked if she had heard about Petitioner's involvement with the FBI; McNorton had not. Aldridge said she had tried to get him to call either McNorton or Phillips. (Resp. App. 16-17.) Shortly thereafter, McNorton called Phillips. (Resp. App. 18, 42.) Phillips commended Petitioner for informing the FBI about Tobiason. (Resp. App. 3-4, 42-43.) However, he said that Petitioner should not be involved in any further investigation. (Resp. App. 18, 42-43.)

Petitioner Promises Respondent that he will not be Involved in the Investigation.

McNorton told Phillips that Petitioner was planning to go to a gun show that weekend and potentially wear a device to surreptitiously record his conversation with Tobiason. Phillips said he knew nothing about this and asked McNorton to call Rupp. (Resp. App. 18.) Phillips and McNorton discussed the concern that this could defeat the trust or confidence that their criminal defendant

clients had in the FPD's office. (Resp. App. 19-20, 42-43.) Phillips said that the FBI had professionals who were more qualified to do this than Petitioner. (Resp. App. 43.)

Later that day, McNorton called Petitioner. Petitioner told her about Tobiason's interest in biological weapons, Petitioner's subsequent meeting with the ATF and FBI, and that Tobiason would be attending a gun show in Wichita the following weekend. (Resp. App. 20-21.) Petitioner also told McNorton that he and Agent Vick had discussed possible scenarios of what Petitioner could do to assist the FBI, including wearing a wire so the FBI could monitor his conversation with Tobiason. (*Id.*)

McNorton then called Phillips. They discussed that Petitioner's actions would be a conflict of interest and their concerns about the perception of the FPD's office if Rupp was called as a witness for the prosecution. Phillips told McNorton to instruct Rupp that he could not be working with the FBI and continue his employment. (Resp. App. 21-22, 43.)

McNorton then explained these concerns to Petitioner. She said that the FBI had people who were very capable of handling the investigation. She also told him that if he wanted to continue his involvement with the FBI investigation, he could not continue his employment with the FPD. Petitioner understood this. (Resp. App. 3, 22-23.) Petitioner testified that he understood that he could not be involved in any "substantive investigation" by the FBI. (Resp. App. 3, 9.) Petitioner told McNorton that he "would not sneak around her." (Resp. App. 5.)[2]

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[2] As such, there is no genuine issue of material fact regarding the specific instructions Petitioner received from his supervisors – despite Petitioner's attempts to create such an issue. *See* Writ, at pg. 5, 27-28.

Also on June 9, 1998, Petitioner told Cyd Gilman, an attorney at the FPD's Wichita office, of his desire to work with the FBI on this investigation. Gilman told Petitioner that was a conflict of interest, could destroy the FPD's credibility, and that he could possibly lose his job. She also told him that the FBI was one of the most powerful federal agencies and would have other people who could do this. (Resp. App. 54-55.) Subsequently, Gilman indicated that she could not trust Petitioner to work as an investigator on her FPD cases. (Resp. App. 55-56.)

McNorton talked with Petitioner on June 10, 1998. Petitioner said that he really needed his job and that "they [the FBI] don't need me to do this" but that "I really, really want to do it." McNorton told Rupp that the FBI didn't need him and that if he decided to work with the FBI, he should let her know immediately. (Resp. App. 23.)

Petitioner Intentionally Deceives Respondent.

Later that day, Petitioner told McNorton that he had spoken with Agent Vick. He asked McNorton what his boundaries were. McNorton said Petitioner in no uncertain terms that he was "out" of the investigation, that he could do nothing more on the case. (Resp. App. 7-9,[3] 23-24.) Rupp said that he told the FBI that he would let them know if he heard from Tobiason. McNorton said "No, let us know and we will see how to proceed." (*Id.*)

Phillips' and McNorton's unequivocal instructions to Petitioner were that he could not be involved in the

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[3] Respondent anticipates that Petitioner will argue that there is an issue of fact as to whether McNorton said this. At Petitioner's deposition, however, he testified that he did not recall specifically, but that "I remember something like that." (Resp. App. 7.)

investigation, not simply that he was to refrain from wearing a wire. (Resp. App. 3, 21-24.) Despite these specific instructions – and his promises to McNorton – Petitioner continued to be involved surreptitiously in the Tobiason investigation. (Resp. App. 8-10.)

From the beginning of Petitioner's involvement with the FBI, Agent Vick felt that the investigation and potential prosecution of Tobiason could occur without Petitioner's assistance. (Resp. App. 38.) Even so, Vick instructed Petitioner to keep his involvement confidential from "everyone," including his employer. (Resp. App. 5-6, 34-35.) Although Vick had made an agreement with Petitioner that he would not be called to testify as a witness in regard to Tobiason (Resp. App. 33), no one informed the FPD of this until after Petitioner had been asked to resign. (Resp. App. 37-38.)

At Vick's request, Petitioner wrote to Tobiason expressing a sympathetic attitude and inquiring about Tobiason's next visit to Wichita.[4] (Resp. App. 8-9, 14.) Petitioner did not want the FPD to know that he had written the letter to Tobiason because his job could be in jeopardy. (Resp. App. 5-6.)

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[4] Petitioner allegedly "felt like [he] was the closest person to [Tobiason] and seemed to be one of the few [Tobiason] would talk to." Writ, at pg. 6, *quoting* App. J3. This self-serving statement is sheer speculation and inappropriate for summary judgment. Petitioner has no idea who was "close" to Tobiason or whether the FBI had other individuals meeting with him. Even if no one else was, this does not mean that Petitioner was the only person capable of doing so. This statement is even less credible considering Agent Vick's testimony that Petitioner was unnecessary to the investigation and prosecution of Tobiason. (Resp. App. 38.) And, it is undisputed that Tobiason sold these materials – and had such conversations with Petitioner – in public. (App. C-1-C-10.)"

Disruption to the Office of the FPD.

In mid-June, 1998, Petitioner received a response from Tobiason. (Resp. App. 14.) Tobiason wrote, "I have already decided an effective and quite appropriate solution to both the justice system and govts' (sic) actions." Tobiason also asked Petitioner if he would be at the Wichita gun show, September 11-13, 1998. (Resp. App. 14-15.) Petitioner turned the letter over to the FBI. (Resp. App. 15.) He was asked by the FBI if he would be attending the gun show and, if so, would he assess Tobiason's "state of mind." (Resp. App. 11.)

On September 9, 1998, Petitioner spoke with Aldridge. Aldridge asked what he had planned for that weekend; he replied that he "was going to do a favor for the FBI." Aldridge told Petitioner that he needed to speak with McNorton before he did so. (Resp. App. 10-11.)

The next day, Petitioner told McNorton that he had written a letter to Tobiason and had received a letter in return. He also said that the FBI wanted him to attend the gun show and assess Tobiason's state of mind. *Id.* For the first time, Petitioner told McNorton that he met with the FBI five or six more times during the summer — after he promised that he would not be involved in any further FBI investigation. Petitioner told McNorton that he had discussed various levels of witness protection with the FBI and that the FBI also read "Code Information" to him. Rupp said that he was violating his agreement with the FBI by discussing this with her. (Resp. App. 11-13, 24-26.)

The next day, McNorton participated in a conference call about this situation with Phillips and Charles Dedmon, a FPD attorney in the Topeka office. They discussed that they had attempted to correct the situation when it

arose in June, but Petitioner had disregarded their directive not to be involved with the FBI investigation. McNorton was particularly concerned because Petitioner told her of his continued involvement only after Aldridge had instructed him to do so. McNorton said that she did not see any other option but to terminate Petitioner. Phillips stated that he agreed and that they could no longer trust Petitioner. (Resp. App. 26-29, 44-45.)

Petitioner's actions clearly caused a disruption within the FPD system. In addition to the concerns of Gilman, discussed above, Dedmon testified that Petitioner's actions disrupted the work of the FPD's office. Dedmon stated that he could not use Petitioner as an investigator on sensitive matters because of his deceptive behavior. (Resp. App. 66-68.) Further, the work of the FPD's office was disrupted when McNorton, Dedmon, Aldridge, and Phillips were forced to deal with this continuing situation rather than devote their time to defending their clients and other necessary office tasks. (Resp. App. 16-31, 48-52, 54-56, 66-68.)

Phillips also had concerns regarding how Petitioner's actions would appear to the individuals the FPD's Office represents. FPD clients often assume that the Defender is part of the prosecution because it is a governmental agency. Phillips was concerned that this assumption would be aggravated if clients became aware that a FPD employee assisted in an FBI investigation. (Resp. App. 47.)

Petitioner went to the gun show that Saturday and Sunday and spoke with Tobiason. (App. F-10, ¶ 53; Resp. App. 10.) Petitioner did not tell Tobiason that he was working with the FBI. Tobiason was aware, however, that Petitioner worked for the FPD. (Resp. App. 13.) On the following Monday, September 14, 1998, Petitioner again

met with Agent Vick and told him what Tobiason had said. (App. F-12, ¶ 70.)

Petitioner is Fired because of his Deception.

That same day, Phillips, Dedmon, and McNorton traveled to Wichita to meet with Petitioner. (Resp. App. 29-30.) Phillips told Petitioner his continued undercover participation in the investigation gave them no choice but to terminate his employment. (Resp. App. 13, 52-53.) Petitioner was given the choice of resigning or being terminated. (Resp. App. 52.)

It was irrelevant to the FPD whether Petitioner attended the gun show and spoke with Tobiason that weekend. The real issue was that Petitioner chose to be involved in the investigation after he had been instructed not to be – and after he promised he would not be. (Resp. App. 26-29, 45-47, 52-53.)

In a letter dated September 18, 1998, Phillips reiterated to Petitioner that his continued involvement with the FBI created a breach of trust and an atmosphere where he could no longer be trusted to do what he was told or to keep sensitive information confidential. (Resp. App. 13, 59.) Phillips said that the position of investigator requires a high degree of trust due to the confidential and sensitive nature of the information an investigator must possess to carry out the functions of that position. (Resp. App. 59.)

Petitioner was informed that he had violated the Code of Conduct for FPD employees, specifically Canon 1, Canon 2, Canon 3 A, B, and F. (Resp. App. 59-60, 74-78.) In this regard, the letter stated the following violations by Petitioner:

1. Not personally observing high standards of conduct so that the integrity and independence of the office are preserved and so that the defender office reflects a devotion to serving the public defender's clients and the principle of equal justice under law. See Canon 1;
2. Engaging in activities that would put into question the propriety of your conduct in carrying out the duties of the office. See Canon 2;
3. Not respecting and complying with the canons, by not reporting to your supervising authority any attempt to induce you to violate the canons, and by not being faithful to professional standards and maintaining competence in your profession. See Canon 3A and B;
4. Not avoiding conflicts of interest, and by not advising me of your renewed involvement in the FBI investigation when you knew that such could constitute a conflict of interest in the performance of your duties. You should have observed the restrictions on your activities imposed by me in this regard. See Canon 3F.

(*Id.*) This letter accurately reflects the reasons why Petitioner was terminated. (Resp. App. 47-49.)

The Personnel Manual provides a procedure for FPD employees who want to contest adverse employment action. (App. F13-F14, ¶ 83.) Petitioner appealed his termination pursuant to this procedure. (App. F-14, ¶ 85.) Following the Adverse Action Hearing, Phillips affirmed his decision to terminate Petitioner. (Resp. App. 62-65; App. F-15, ¶ 90.)

ARGUMENT FOR DENYING THE WRIT

Petitioner's Writ is based upon three arguments, all without merit. First, Petitioner refuses to make the distinction between his initial contact with the FBI and his

deceptive and unnecessary actions that followed. The distinction is obvious and has been recognized by the district court, the Tenth Circuit Court of Appeals, and Respondent. Even the FBI has conceded that Petitioner's continued involvement in the investigation was unnecessary.

Second, Petitioner contends that the Tenth Circuit's opinion conflicts with holdings of this Court, as well as the Fifth and Sixth Circuits. When reviewed in context, the cases cited by Petitioner are harmonious with the Tenth Circuit's opinion in the case before the Court.

Finally, Petitioner alleges the existence of "several genuine issues of material fact," which would preclude summary judgment. The alleged issues relate to: 1) the disruption Petitioner caused to the operations of the FPD; 2) the instructions Petitioner received from the FPD regarding his involvement with the FBI investigation; and 3) the importance the FBI placed on Petitioner's assistance. According to Petitioner, the Tenth Circuit did not resolve these alleged inconsistencies in favor of Petitioner.

In reality, Petitioner's sworn deposition testimony verifies that 1) the disruption to the FPD was real and lessened only as a result of Petitioner's continued deception; 2) Petitioner was specifically instructed – and he agreed – that he could not be involved in the investigation; and 3) that the FBI felt Petitioner's continued involvement was unnecessary. Based upon the uncontroverted evidence and testimony, no genuine issue of material fact exists.

The Tenth Circuit correctly weighed the interests of Petitioner against those of Respondent. As such, the Tenth Circuit upheld the district court's decision to grant summary judgment to Respondent.

I. THE TENTH CIRCUIT PROPERLY WEIGHED THE VALUE OF PETITIONER'S ACTIONS AGAINST THE FPD'S NEED TO ADEQUATELY REPRESENT ITS CLIENTS.

The Court must employ a two-part test when confronted with a plaintiff alleging that the termination of his employment violated his right to free speech. *See Melton v. City of Oklahoma City*, 879 F.2d 706, 727 (10th Cir. 1989). The Court must first determine whether the speech at issue was in regard to a "matter of public concern." If it was not, the analysis stops because the plaintiff has failed to state a cause of action. *See generally Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

Under this analysis, the Tenth Circuit held that it need not address the issue of whether Petitioner's continued contact with Tobiason and involvement in the investigation was speech on a matter of public concern. The Tenth Circuit noted "some question as to whether [Petitioner's] later actions may be characterized as 'speech.' "[5] App. A-9 n. 3 (*citing Horstkoetter v. Dept. of Public Safety*, 159 F.3d 1265, 1272 n. 3 (10th Cir. 1998)). Regardless, the Tenth Circuit held that "any ambiguity as to the status of [Petitioner's] actions under the first part of the *Pickering/*

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[5] Although not an issue on appeal, Respondent strongly contends that Petitioner was not terminated as a result of "speech" on a matter of public concern. Petitioner deceptively assisted in an investigation conducted by an agency whose function diametrically conflicted with the agency by which he was employed. He deliberately and knowingly defied direct and reasonable orders – and knowingly lead his employer to believe that he was following that order. *This* was the reason Petitioner was fired, not for any views he expressed or comments he made on a matter of public concern. *Compare generally with Pickering*, 391 U.S. 563; *Connick*, 461 U.S. 138.

Connick test is of limited significance, because there is no uncertainty regarding the legal resolution of the second part of that test." App. A-9. As to the second part of the balancing test, the Tenth Circuit held that Respondent's interests in maintaining the effectiveness and integrity of the FPD's office outweighed those of Petitioner in unnecessarily and deceptively continuing in the FBI investigation.

A. Petitioner Improperly Refuses to Distinguish Between his Initial Contact with the FBI and his Continued, Deceptive, and Unnecessary Involvement in the Investigation.

Initially, Petitioner infers that only he, by his actions, recognized the importance of public "security." Writ, at pg. 15. As the record unequivocally shows, nothing could be further from the truth. The district court, the Tenth Circuit Court of Appeals, and Respondent all recognize the importance of public security. Further, all recognized the value of Petitioner's initial contact with the FBI. It is undisputed that Respondent commended Petitioner for taking this information to law enforcement officials. (Resp. App. 3-4, 42-43.) The Tenth Circuit stated that Petitioner's "*initial* contact with the FBI did reveal new information to the public, and so may have been entitled to greater weight under the balancing test."[6] App. A-12 (emphasis in original).

Petitioner's argument fails because he refuses to distinguish between his initial contact with the FBI and his deceptive and unnecessary involvement in the investigation. This distinction has been recognized by Respondent,

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[6] This initial contact was not analyzed further by the Tenth Circuit because it was not at issue between the parties.

the district court, the Tenth Circuit, *and* by the FBI. "[O]nce [Petitioner] had tipped the FBI, it was certainly capable of carrying on an investigation of Mr. Tobiason with or without [Petitioner's] help. Indeed, Agent Vick testified to this fact." App. A-12.

B. The Value of Petitioner's Actions to the FBI Does Not Outweigh Respondent's Interests.

Petitioner argues that "the interests of the listeners of Petitioner's cooperative statements – FBI agents acting on behalf of the public – were left out of the Tenth Circuit's equation." Writ, at pg. 16. Petitioner cites two cases to support his contention that his "continued cooperation" with the FBI "should have been highly valued" because of his alleged importance to the FBI. *Id.*

Respondent does not dispute that *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972) and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-7 (1976) support the proposition that the "right to receive" information is also protected by the First Amendment. Even so, both cases cited are distinguishable from this situation. In both *Kleindienst* and *Virginia State Bd. of Pharmacy*, the "listeners" were parties to the litigation – not so in the case at bar. These cases also dealt with the dissemination of information to the public at large – an element also missing from the case at bar.

Regardless, the value to the "listeners" will not tip the balance in favor of Petitioner given the undisputed testimony in this case. FBI Agent Vick specifically testified that Petitioner's cooperation in the investigation was unnecessary. Resp. App. 38. Petitioner cannot in good faith argue the importance of his continued involvement in the FBI investigation.

C. The Tenth Circuit Opinion Will Not "Chill" Citizen Cooperation with Law Enforcement.

Petitioner argues that the Tenth Circuit "impermissibly chills valuable speech" because citizens will not be able to determine if their "cooperation is 'imperative' or 'irreplaceable.' " Writ, at pg. 17. Again, Petitioner ignores the distinction between his initial contact with the FBI and his continued involvement in its on-going investigation. As the Tenth Circuit stated, "nothing in [this] decision discourages, much less prohibits, [Petitioner's] original contact with the FBI. As such, it is unlikely to cause significant avoidance and error costs."[7] App. A-13, n. 4. Although Petitioner refuses to see this distinction, it was obvious to the district court, the Tenth Circuit, and Respondent. It is safe to say that this distinction will be obvious to citizens wishing to provide information regarding criminal investigations.

In addition, this decision will have little or no bearing on the typical United States citizen. Petitioner's situation was unique from that of the average citizen because he was employed by the FPD – an agency with an adversarial relationship to the FBI as well as a duty of propriety and confidentiality to its clients who are investigated by the FBI and/or charged with crimes.

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[7] Further, Petitioner was simply instructed to bring new information to the FPD before going to the FBI. (Resp. App. 24.)

II. THE TENTH CIRCUIT OPINION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OTHER CIRCUITS.

A. Both the Sixth and Tenth Circuits Acknowledge that "Initial" Speech May Be of "Greater Concern to the Public."

Petitioner next argues that the Tenth Circuit opinion has created a conflict with the Sixth Circuit opinion of *Chappel v. Montgomery County Fire Protection*, 131 F.3d 564 (1997). Writ, at pg. 19. Petitioner contends that the Tenth Circuit created a distinction between "old and new speech," giving greater protection to "new" speech. *Id.*

Petitioner's reliance on *Chappel* is misplaced. In that case, a plaintiff alleged retaliation because of whistleblowing complaints he made regarding corruption in the public agency in which he worked. In that context, the Sixth Circuit rejected the idea that the speech of such an employee is unprotected merely because it "comes late to a public debate," after "the controversy has already been defined." *Id.* at 577.

Chappel specifically relied on this Court's *Connick* and *Pickering* opinions to recognize the importance of the "unfettered *interchange* of ideas" and "free and open *debate* . . . vital to informed decision-making by the electorate." *Id.* (emphasis in *Chappel*) (internal citations omitted). *Chappel* is clearly distinguishable from the situation facing the Court. Petitioner was not "fettered" in his attempt to exchange ideas, nor was he foreclosed from engaging in "free and open debate."

Chappel held in no uncertain terms "that speech which breaks a story may be of greater concern to the public . . . " *Id.* As such, there is no conflict between the Tenth Circuit's opinion and the Sixth Circuit in *Chappel*.

Consistent with *Chappel*, the Tenth Circuit held that Petitioner's "*initial* contact with the FBI . . . may have been entitled to greater weight under the balancing test." App. A-12 (emphasis in Tenth Circuit opinion). Petitioner's unnecessary continued involvement with the FBI, while protected, "did not implicate the same level of public concern . . . " *Id.*[8]

This diffuses Petitioner's argument that the "Tenth Circuit repeatedly diminished the importance of [Petitioner's] speech because it did not involve complaints of official wrongdoing." Writ, at pg. 20. According to Petitioner, the Tenth Circuit gave greater importance to government workplace whistleblowing than to providing information to law-enforcement.[9] Petitioner mischaracterizes the Tenth Circuit's holding. The importance of his initial contact with the FBI was not "diminished" by the district court, the Tenth Circuit, or Respondent. As stated above, the Tenth Circuit held that Petitioner's initial contact with the FBI may have been entitled to protection similar to that given to whistleblowers[10] – but his continued, unnecessary and deceptive involvement in the FBI investigation is not entitled to the same heightened level of protection. App. A-12.

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[8] The Tenth Circuit also noted that "[t]here is also some question as to whether [Petitioner's] later actions may be characterized as 'speech.' " App. A-9, n. 3.

[9] Petitioner infers that the Tenth Circuit was incorrect to compare his actions with whistleblower cases. The Tenth Circuit did so, however, because Petitioner cited such cases cited in his Tenth Circuit brief.

[10] Again, the Tenth Circuit did not analyze this because it was not at issue.

B. The Tenth Circuit Did Not Categorically Prohibit Speech that Conflicts with the Employer's Interests.

Petitioner next contends that the Tenth Circuit opinion conflicts with both this Court and the Fifth Circuit by allowing "categorical prohibitions on speech that might conflict with the interests of the employer." Writ, at pg. 21. Again, Petitioner's argument is based on a misinterpretation of the cases he cites.

In *Hoover v. Morales*, the defendant state university instituted a policy under which university professors and state employees were prohibited from serving as expert witnesses or consultants for litigants that opposed the state. 164 F.3d 221 (5th Cir. 1998). "Boiled down to its core, the State is simply arguing that the State's interest is in preventing state employees from speaking in a manner contrary to the State's interests." *Id.* at 226. *Hoover* is distinguishable because the purpose of the defendant university's policy was to protect the defendant university. In the case before the Court, the FPD was concerned about the representation of its indigent clients.

The *Hoover* court described the State's identified interest "amorphous." *Id.* It held that the State failed to specify "how the State's interest in promoting efficiency of the public [educational] services it performs . . . will be adversely affected by allowing state employees to serve as or be retained as expert witnesses or consultants." *Id.*

The interests and disruption identified by the FPD in the present case are anything but "amorphous." Respondent specifically identified how Petitioner's actions adversely affected the workings of the vital public service performed by the FPD. FPD employees testified about the extensive discussions that occurred in September 1998

after Petitioner finally confessed to McNorton and Phillips at the urging of Sharon Aldridge. Attorneys stated that they would no longer work with Petitioner. (Resp. App. 53-56, 66-68.) Employees legitimately felt that they could not trust Petitioner after he actively and intentionally deceived them. (*Id.; see also* 16-31, 48-52, 54-56.) The disruption was real and Respondent had every right to alleviate the situation before it escalated to the point where the FPD was unable to adequately represent its clients. This is especially true considering the importance of the service provided by the FPD.

To the degree that the disruption to the FPD was arguably "minimal" in the summer of 1998, it is because Petitioner misled his coworkers to believe that he was no longer involved in the FBI investigation. Once Petitioner misled the FPD employees that he would not be involved in the FBI investigation, the FPD employees reasonably believed they had no basis for concern. Therefore, Petitioner's deception was the only reason the disruption was abated during the summer of 1998. Allowing Petitioner to rely on a lack of disruption during this time period would be rewarding him for his deceitful behavior.

For these reasons, Petitioner's reliance on *U.S. v. National Treasury Employees Union* is equally misplaced. 513 U.S. 454 (1995). In that case, this Court specifically held that the government may take adverse action based on "employee speech that has adverse effects on 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 513 U.S. at 467, n. 11 (citation omitted). The Court also reiterated that the employer must demonstrate real harm. *Id.* at 475. As stated above, this is exactly what

Respondent has done. As discussed in the following section, this analysis is consistent with other holdings of this Court.

Respondent and other FPD employees had legitimate concerns that the impropriety of Petitioner's actions would adversely affect their credibility with their clients. Such concerns were proactive. Respondent was attempting to avert an ethical and client relations disaster before it occurred. Petitioner infers that Respondent had some sort of duty to retain Petitioner as an employee until he had adequately disrupted the workings of the FPD and damaged client relations beyond repair. *See* Writ at pg. 21 – 24. This argument is ludicrous. *See Moore v. City of Wynnewood*, 57 F.3d 924, 934 (10th Cir. 1995) (holding that the government does not "have to wait for speech actually to disrupt core operations before taking action.")

Petitioner's deception of Tobiason shows that Respondent's concerns were justified. Petitioner exploited his position with the FPD during his conversations with Tobiason. Petitioner said that he was employed by the FPD, but *did not* tell Tobiason that he was working with the FBI. (Resp. App. 13.) If made public, FPD clients would logically assume that their FPD investigator could also be working for the FBI, like Petitioner.

The Tenth Circuit has specifically held that actual disruption may be shown by reasonable predictions of disruption. *Janzten v. Hawkins*, 188 F.3d 1247, 1257-58 (10th Cir. 1999). *See also Cragg v. City of Osawatomie*, 143 F.3d 1343, 1347 (10th Cir. 1998). Regardless, once Petitioner's deception was exposed, the evidence is clear that the disruption to the FPD's office was tangible. Petitioner's argument conveniently ignores the substantial uncontroverted testimony regarding the specific disruption to the FPD. (Resp. App. 16-31, 48-52, 54-56, 66-68.)

C. The Tenth Circuit Opinion Is Consistent with Supreme Court Authority.

The Tenth Circuit was squarely in-line with *Pickering*. 391 U.S. 563. According to *Pickering*, the Court must "balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

1. Government employers have the right to restrict the speech of their employees.

Public employment cannot be conditioned "on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. at 146. Even so, the government, as an employer, has the right to control certain aspects of employee speech. In fact, "the government as employer indeed has far broader powers than does the government as a sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (*citing Pickering*, 391 U.S. at 568) (other citations omitted).

"This assumption is adequately borne out by considering the practical realities of government employment, and the many situations in which, we believe, most observers would agree that the government must be able to restrict its employees' speech." *Id.* at 672.

> The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just

> in the name of efficiency. **But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.**

Id. at 675 (emphasis added).

2. Petitioner's actions fly in the face of "promoting efficiency" of the Federal Agency for whom he was employed.

Again, Respondent agrees that it was appropriate for Petitioner to provide the initial information regarding Tobiason to the FBI. Petitioner's continuing involvement in the FBI investigation while deceiving his employer cannot, however, be said to be of great importance. *See Chappel*, 131 F.3d at 577. Regardless of Petitioner's opinion regarding his relationship with Tobiason, FBI Agent Vick testified that Petitioner was unnecessary to the investigation and potential prosecution of Tobiason. (Resp. App. 38.)

Petitioner's continued involvement with the FBI created a devastating breach of trust. Petitioner deliberately defied a direct and reasonable order from his employer. He knowingly and deliberately misled his employer about his action, which clearly violated the Canons 1, 2, and 3 (A), (B) and (F) of the FPD's Code of Conduct. (Resp. App. 59-60, 74-78.) His actions flew in the face of "promoting the efficiency" of FPD's public services.

In the present case, Respondent's "valid state interest" is undeniable – "to ensure the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act, and other congressional mandates on behalf of those who cannot afford to retain counsel and other necessary defense services." (Resp. App. 70.) To perform these vital

services, the FPD *must* maintain independence from federal law enforcement agencies such as the FBI. Respondent's valid state interest clearly outweighs any right Petitioner had to mislead the FPD.[11]

"**When someone who is paid a salary so that [he] will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain [him].**" *Waters*, 511 U.S. at 675 (emphasis added). Respondent attempted to reasonably restrain Petitioner's actions. When Petitioner defied Respondent's reasonable instruction and deceived Respondent, Respondent had no choice but to terminate Petitioner's employment.

D. Petitioner's Actions were Insubordinate.

Petitioner contends that the lower courts failed to "acknowledge Petitioner's considerable evidence that, after receiving his employer's directives, [Petitioner] severely restricted his cooperation with the FBI and declined the FBI request to serve as a confidential informant, to tape record conversations, to become a witness, or otherwise to become an 'undercover' operative in an FBI investigation." Writ, at pg. 13; *see also* Writ, at pg. 8. He refuses to accept responsibility for his actions. His deception was the *definition* of insubordination. The above-quoted reason of Petitioner is akin to saying "I lied, but I could have lied more, so I shouldn't be punished for lying." Petitioner's argument is absurd. The Tenth Circuit recognized this when it stated that Petitioner's "own

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[11] The balance weighs even more heavily in favor of Respondent considering Petitioner's participation was unnecessary. (*See* Resp. App. 36-38, 43, 55.)

statements reveal that he deliberately ignored the instructions of his supervisors." (App. A-14.)

Petitioner admits that he was reasonably and unequivocally instructed that he could not be an employee of the FPD and also be involved in an FBI criminal investigation. (Resp. App. 3, 22-23.) He admits that he was told he could lose his job if he continued to cooperate with the FBI. (Resp. App. 3, 6.) He specifically told McNorton that he "would not sneak around her." (Resp. App. 5.) Despite these clear and unambiguous instructions – and Petitioner's agreement to abide by them – Petitioner deceived his employer and coworkers. Respondent was justified and the Tenth Circuit was correct to grant summary judgment.

III. THERE IS NO GENUINE ISSUE OF MATERIAL FACT.

Petitioner's final reason for granting the Writ alleges the existence of "several genuine issues of material fact," which would preclude summary judgment. Writ, at pg. 27. The alleged issues involve: 1) the disruption Petitioner caused to the operations of the FPD; 2) the instructions Petitioner received from the FPD regarding his involvement with the FBI investigation; and 3) the importance the FBI placed on Petitioner's assistance. According to Petitioner, the Tenth Circuit did not resolve these alleged inconsistencies in favor of Petitioner.

As the record clearly shows, there is no genuine issue of material fact. Petitioner's sworn deposition testimony verifies that 1) the disruption to the FPD was real and lessened only as a result of Petitioner's continued deception; 2) Petitioner was specifically instructed – and he agreed – that he could not be involved in the investigation; and 3) that the FBI felt Petitioner's continued

involvement was unnecessary. As such, the Tenth Circuit was correct to grant summary judgment.

A. Petitioner's actions were disruptive to the FPD.

Petitioner contends that the Tenth Circuit misapplied Fed.R.Civ.P. 56 on the issue of disruption to the FPD. Petitioner argued that "the Tenth Circuit resolved whether [his] speech was actually disruptive by focusing exclusively on evidence favorable to the movant, and in disregard of evidence offered by the non-movant." Writ, at pg. 27. "Under fundamental principles of civil procedure embodied by Rule 56," stated Petitioner, "the availability of summary judgment does not turn on whether a *movant* can introduce evidence; it turns on whether the non-movant cannot." Writ, at pg. 27.

Petitioner is partially correct. Rule 56 does revolve around the non-movant's ability to provide evidence contradicting the movant's Motion for Summary Judgment. If, however, the movant initially comes forth with evidence to support the Motion, "an adverse party **may not rest upon the mere allegations or denials of the adverse party's pleading,** but the adverse party's response, by affidavits or as otherwise provided in this rule, **must set forth specific facts showing that there is a genuine issue for trial.**" Fed.R.Civ.P. 56(e) (emphasis added). According to the Rule, summary judgment "**shall be entered**" if the nonmovant fails to so respond. *Id.* (emphasis added).

Respondent has provided the Court with specific evidence of how Petitioner's actions disrupted the FPD's office. (Resp. App. 16-31, 48-52, 54-56, 66-68.) Petitioner contends that the Tenth Circuit "disregard[ed]" his evidence that there was no disruption – without identifying what this evidence was. Petitioner has no evidence to refute the sworn testimony of disruption. He has only his "mere allegations and denials" of disruption. This is why

the Tenth Circuit focused "exclusively" on Respondent's provision of supportive evidence. As such, summary judgment was appropriate under Rule 56.

B. Petitioner Admitted that He Was Aware of the FPD's Instructions.

Petitioner contends that "the Tenth Circuit disregarded an important conflict in the record when it found that [Petitioner] 'deliberately ignored the instructions of his supervisors.' The deposition testimony in the record created a swearing contest regarding exactly what the allegedly insubordinate employee had been instructed not to do." Writ, at p. 27-28.

Any arguable issue of fact that may exist is certainly not "material" and would not preclude summary judgment. Petitioner admitted that McNorton instructed him that he could not continue his employment with the FPD if he wanted to continue his involvement with the FBI investigation. (Resp. App. 3, 22-23.) He testified that he understood that he could not be involved in any "substantive investigation" by the FBI. (Resp. App. 3, 8-9.) He testified that McNorton told him that he could "resign and go work for the FBI," but that his FPD "job is at risk" if he continued to be involved in the FBI investigation. (Resp. App. 3.) Finally, Petitioner admitted that he told McNorton that he "would not sneak around her." (Resp. App. 5.)

There is no genuine issue of material fact regarding the specific instructions Petitioner received from his supervisors – despite Petitioner's attempts to create such an issue. As such, summary judgment is appropriate.

C. Agent Vick Specifically Testified that Petitioner's Involvement Was Unnecessary.

Petitioner's final argument is probably his most desperate. Petitioner contends that

> the Tenth Circuit did not give [Petitioner] the benefit of reasonable inferences regarding the importance to the FBI of his continued cooperation. When [Respondent's] counsel asked Agent Vick whether [Petitioner's] cooperation was 'vital to the prosecution of Mr. Tobiason,' and Vick could answer neither 'yes' nor 'no,' [Respondent's] counsel then attempted to withdraw the question before Vick could elaborate on the reasons for his hesitancy.

Writ, at pg. 28. According to Petitioner, "Vick's response to that question gives rise to an inference that silencing [Petitioner] would cause significant harm to the FBI's ability to achieve its objectives." *Id.*

What Petitioner calls an "inference" is more akin to grasping at straws. Petitioner's counsel on this Writ was not serving in that capacity at the time of Agent Vick's deposition. Possibly, Petitioner's counsel is unaware that the parties had to agree to the FBI's strict restrictions on the subjects about which Agent Vick could be questioned. *See* App. D-3.

At the deposition of Agent Vick, Respondent's counsel had previously asked "Do you feel that the FBI was capable of investigating Mr. Tobiason without the assistance of Mr. Rupp?" (Resp. App. 36.) Before Vick could respond, counsel for the FBI objected that this was "outside the scope" of what Vick was allowed to discuss and instructed Vick not to respond. (Resp. App. 37.) As for the question at issue (App. D-36), Respondent's counsel merely withdrew the question to avoid additional objections and instructions by the FBI's counsel. Petitioner cannot rely on his purely subjective belief as to the reasoning behind the withdrawn question to defeat summary judgment.

The fact remains that Agent Vick specifically testified that the FBI did not need Petitioner's assistance "to continue with any investigation and potential prosecution of Mr. Tobiason." (Resp. App. 38.) Therefore, there is no genuine issue of material fact and the opinion of the Tenth Circuit should be affirmed.

IV. CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Court uphold the decision of the Tenth Circuit which granted Respondent summary judgment as to all of Petitioner's causes of action.

Petitioner deliberately and knowingly defied the direct, reasonable, and unambiguous order of his employer the FPD – and intentionally deceived the FPD to believe that he was following that order. *These* are the reasons why Petitioner was fired. Respondent's actions were legal, reasonable, and justified.

The Tenth Circuit's opinion does not conflict with this Court or other Circuit Courts. There is no genuine issue of material fact. The Tenth Circuit correctly held that Respondent is entitled to summary judgment as a matter of law pursuant to Fed.R.Civ.P. 56.

Respectfully submitted,

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Dated: December 10, 2001.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

K. DANIEL RUPP,

Plantiff,

No. 99-2101-GTV

vs.

DAVID J. PHILLIPS, in
his personal capacity,

Defendant.

DEPOSITION OF K. DANIEL RUPP, the Plaintiff, taken on behalf of the Defendant, pursuant to Notice, on the 15th day of June, 1999, at the Law Offices of Lee J. Hollis, 5100 West 95th Street, Prairie Village, Kansas, before

ANGIE SHERWOOD, RPR, CSR,

of Hostetler & Associates, authorized by law to take depositions anywhere in the State of Kansas.

* * *

[25] Q. How long did you work for the Public Defender's Office after starting in June of '88?

A. Until December of '94.

Q. Is that when you went to the Federal Public Defender's Office?

A. Yes.

* * *

[30] Q. Who supervised you in the Federal Public Defender's Office?

A. David Phillips and then Cindy McNorton.

Q. Give me the time frame that David Phillips supervised you and then Cindy McNorton?

A. Cindy was near the end of my time there. You know, I don't know exactly what the time frame is but the last year.

* * *

[56] Q. Sometime during your employment with the Federal Public Defender's Office, District of Kansas, you saw a draft of the personnel policies and procedures manual?

A. Yes.

Q. And with regard to your employment there at some time before you were fired you signed off on a personnel policies and procedures manual, true?

A. True.

Q. But your testimony today is you don't [57] remember what that, the contents of any of those were, right?

A. True.

Q. But you do have an understanding of what a personnel policies and procedures manual is, don't you?

A. Yes.

Q. And you had that understanding while you were employed with the public defender, true?

A. Yes.

* * *

[104] Q. So I'm on track then, that at some point after you talked to David Phillips he told you to talk to Cindy. You talked to Cindy on the phone. The conversation with Cindy was one where she threatened your job if you were involved in any way with the FBI investigation of Tobiason. Is that an accurate statement?

A. It's something like that.

* * *

[105] A. I think she said something like this: She said you can resign and go to work for the FBI. I remember that phrase.

Q. Do you recall her saying anything to the corollary of that and, that is, if you work with the FBI you can lose your job?

A. Something like that, sure. I think she may have also said your job is at risk.

* * *

[115] Q. All right. Did Cindy or David say anything about the fact that you had gone to the FBI that you remember?

A. On that day?

Q. Yes.

A. Did David or Cindy say anything else about me going to the FBI?

Q. Did they say anything about your going to the FBI, words to the effect of well, you [116] should have

gone to the FBI or words to the effect of you should have never reported that?

A. I see. David said like well, good, that's good. I sort of like talked to Cindy and I was telling him, I was mostly telling him.

Q. But when you told David that you had gone to the FBI he said good, that's good?

A. Something like that.

Q. And he didn't fire you in that phone conversation?

A. No.

* * *

[118] A. Well, that first day Dennis from the ATF sent me up to Paul Vick's office.

Q. The same day?

A. This is the very first contact Monday morning.

* * *

[120] Q. And the conversations with David Phillips and with Cindy where were you when you talked to them?

A. I think that was my office.

Q. Had you been to the FBI before you talked to them? In other words, had you gone to the FBI?

A. Before I even went to work, yes. On the way upstairs I stopped off at ATF. They sent me to FBI and then I went to work.

Q. And made the calls to David and Cindy?

A. Yeah.

Q. And that was all the same day?

A. I think so.

Q. And it was a Monday?

A. I think so.

* * *

[129] Q. Look at page two, the top paragraph, because I want to ask you about something you say in there. It says midway in that first paragraph "Cindy McNorton told me I could not be a witness in any way in this matter and my job would be at risk if I made myself a witness. I acknowledged that and said I would not sneak around her."

Did you say that in the letter to Mr. Phillips dated September 24?

A. Yes.

Q. Was that your intent to represent to Cindy that you weren't going to sneak around her?

A. Yes.

Q. When did you tell Cindy that you had, [130] in fact, worn a wire – I'm sorry – that you had, in fact, written a letter to Tobiason?

A. Maybe September 11.

Q. Of 1998?

A. Right.

Q. What's the reason you didn't tell her when you did it?

A. I thought I had a perfect right to send a letter to this guy. I was scared to death that there was going to be a catastrophe. She had threatened my job over this deal. I have been asked by the FBI to write this letter. They said don't tell anybody.

Q. Who is "they"?

A. Paul Vick. And I knew at that time I was the only one who was talking to the guy who had any input to him at all.

Q. Did you ask Paul Vick or anyone from the FBI if you could tell Cindy before you wrote the letter? I mean as I understand your recollection, the FBI says don't tell anybody. Cindy has threatened you with your job if you cooperated with the FBI so did you say well, I need to tell my employer?

A. This was after I was writing the [131] letter after agreeing to it? No.

Q. Why not? Why didn't you ask the FBI if you could tell Cindy?

A. After that initial threat I was afraid to say anything to her.

Q. Because you would lose your job?

A. I was afraid of losing my job.

* * *

[132] Q. I'm sorry. June 10 was a Tuesday. June 9 would be Monday. On either that Monday or Tuesday did you talk to her and ask her what the boundaries were and what was over the line?

A. I don't recall that specifically but I'm almost sure I did.

Q. Do you recall her telling you that you were out of the investigation and that the FBI [133] should be left to do their own work and that following your reporting of the incident about Tobiason you didn't need to do anything more in regard to the matter?

A. I remember something like that.

Q. Do you recall Cindy telling you to talk to her or get ahold of her in the event the FBI had any further contact with you?

A. No. All I remember is the no witness.

Q. Look at Exhibit 6 to Phillips' deposition, A01690.

A. Okay.

MR. HOLLIS: What's the question?

MR. RUPE: There isn't a question yet.

Q. (By Mr. Rupe) Have you looked at that page?

A. Yes.

Q. I want to look at the last three lines handwritten. "Told him no, let us know and we'll see how to proceed."

Do you recall Cindy saying anything to you to the effect that you need to let the Federal Public Defender's Office know and we [134] will see how to proceed?

MR. HOLLIS: Object to the reference to a document that is not in evidence.

MR. RUPE: I'm sorry. It's Exhibit 6, the last page.

MR. HOLLIS: Same objection.

THE WITNESS: I'm sorry. I don't recall that specifically.

Q. (By Mr. Rupe) You are not saying she didn't say that; you are just saying you don't remember, right?

A. That's true.

Q. Now, between June 10, 1998 and September 10, 1998 – let's use September 9 as our point of reference. Between June 10, 1998 and September 9, 1998 what involvement did you have with the Tobiason matter?

A. That's after the letter is –

Q. After your conversations on the phone with David and Cindy that we have talked about and before you told Cindy you had had involvement further, between those two bookends, those two dates, what involvement did you have with the Tobiason matter?

[135] A. Say the dates one more time. I'm sorry. Please.

Q. Between June 10, 1998 –

A. And the 9th of September.

Q. September 9, 1998.

A. Paul Vick called, what's going on with your boss, did you tell your boss and I said yes. He said what did

they say, you know, and I go well, they don't want me to be involved in any substantive way in this deal and he said well, do they know that, you know, people could die, that kind of thing, and I said they told me I can't be a witness. And then I said, I said something along the lines of I have to, you know, do what you ask. And he said well, sort of can you write the guy a letter and I said I'm sure that's okay. They can't fault me for that and so I kind of cranked out a letter and I told Paul Vick, I said I'm going to include a clause in here begging this guy not to act before we talk. And he said that would be fine.

Q. Are you finished with your answer?

A. Probably took them a copy of the letter.

Q. Took who a copy of the letter?

[136] A. The FBI. There were phone calls back and forth like –

Q. Between whom?

A. Paul Vick and I about him saying things. You know this guy has drawn some attention in California, some people made a report on him. They are doing a background check on him. He has got evidently the ability to carry this stuff out. He has his house surrounded by explosive-type booby trap things. You know, more along the lines what could he do and I told him from what I had been talking to him about that he had threatened to kill a lot of people and he wasn't specific but he mentioned several different easily made like weapons of mass destruction.

Q. So you sent the letter?

A. Yes.

Q. And did you show the letter to Cindy or to David?

A. No.

Q. Before you sent it?

A. No.

* * *

[142] Q. Other than the letter did you have any other involvement in the Tobiason matter before you talked to Sharon Aldridge on September 9 or 10?

A. I got a letter back, a return.

Q. Do you have the letter?

A. No.

Q. Tobiason wrote you back?

A. Right. That letter to Agent Duke Earl.

Q. Did you attempt to attend a gun show where Tobiason was there in September of '98?

A. Yes.

Q. Was he there?

A. Yes.

Q. But before you went to the gun show did you have a conversation with Sharon Aldridge about going to the gun show?

A. Yes.

Q. Who was Sharon Aldridge?

A. Paralegal. She offices right next to me.

Q. Friend?

A. Friend.

Q. Did you tell her that you were going [143] to the gun show at the request of the FBI?

A. I said I was going to do a favor for the FBI.

Q. Did she tell you you better tell Cindy?

A. Yes.

Q. And you called Cindy?

A. Yes.

Q. And what did you tell Cindy when you called her?

A. I said something along the lines of like, you know, Cindy, I sent a letter to that guy. I got a letter back. The FBI wants to know If I go to that gun show and if Tobiason is there, what his state of mind is. And that would be – would be sort of like the end of my involvement.

* * *

[144] Q. Did you tell Cindy you were violating your agreement with the FBI by talking to her?

A. I don't recall.

Q. At the time you talked to her did you feel like you were violating your agreement with the FBI?

A. I don't know what I felt at that time. It was stressful.

Q. Her notes on Exhibit 6 to Phillips' deposition at the bottom says "He was violating [145] agreement with them by even telling me this."

A. Could be.

Q. You are just saying you don't have a recollection of that?

A. Not specifically now, you know. It's like –

Q. Does reading that refresh you recollection that there was some discussion about your living up to the agreement with the FBI and what affect talking to Cindy would have on that?

A. I don't have a good recollection of that. I'm sorry.

Q. Did you tell Cindy you were going to go to the gun show?

A. I don't know if I told her I'm planning to go, I'm going. I think I told her I'm going.

Q. Well, let's avoid what you think or suppose or assume and concentrate on what you remember. Do you recall telling her you were going to the gun show?

A. Yes.

Q. Had you told her how many times you had met with the FBI during the course of the [146] summer?

A. I don't know. I don't know if she asked me that. I would have told her if she asked.

Q. Sure. With regard to Phillips Exhibit 6 there is a mention on the last page of five, six more times this summer. Is that consistent with how many times you had talked to the FBI?

A. Sure.

* * *

[147] Q. (By Mr. Rupe) We are now back on the record and I want to draw your attention to September 14, 1998 and that meeting that you had with Cindy. Was David there?

A. Yes.

Q. All right. Did David tell you that because you had continued to participate in the FBI investigation you should resign?

A. I remember the exact words we have no choice but to terminate you.

* * *

[150] Q. Did Tobiason know you worked for the Federal Public Defender?

A. Yes.

Q. Did he know you were cooperating with the FBI?

A. No, not that I know of.

Q. Did you volunteer that information to him at any time?

A. No.

* * *

[172] Q. Well, let's take the sentence. Is that a true statement that you, Dan Rupp, advised us, the Federal Public Defender in June, that prior to notifying anyone in this agency, meaning the Federal Public Defender's Office, you Dan Rupp had notified the FBI with information about the activities of a certain individual you believe to be potentially dangerous. Is that a true statement?

A. Yes.

* * *

[175] Q. Did the FBI help you draft the letter to Tobiason?

A. They said write him a letter if you can or please write him a letter. Find out, you [176] know, when he may be back.

* * *

[183] Q. Do you agree with this statement in the complaint that you filed, paragraph 41. "Rupp wrote a single letter to Tobiason in mid June, 1998"?

A. Yes.

Q. Did you request in that letter a catalog of more recent books?

A. Yes.

Q. Did you explain to him there were some positive alternatives to Tobiason's problems with the government?

A. Yes.

Q. When you read Tobiason's response at the end of June, 1998 and he said "I have already decided an effective and quite appropriate solution to both the justice system and government's actions, thanks anyway, will [184] you be at the show eleven thirteen, September"? When you read that did you think there was a possibility you might be a witness?

A. No. It never occurred to me.

Q. So you didn't think the letter was important that you got from Tobiason?

A. Sure, yes.

Q. Sure, you thought it was important or sure, you didn't think it was important?

A. I thought it was important.

Q. In fact, you turned it right over to the FBI?

A. That's true.

* * *

COPY OF TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

K. DANIEL RUPP,

Plaintiff,

vs. Case No. 99-2101-WEA

DAVID J. PHILLIPS, in his personal capacity,

Defendant.

DEPOSITION
OF
CINDY MCNORTON,

taken on behalf of the Plaintiff, pursuant to Notice to Take Deposition, beginning at 10:00 a.m., on the 16th day of July, 1999, at the Capitol Plaza Hotel, 1717 Southwest Topeka Boulevard, in the City of Topeka, County of Shawnee, and State of Kansas, before Susan J. Morris, Certified Shorthand Reporter.

* * *

[33] Q. Okay. When did the issue of Dan's involvement with the FBI first come to your attention?

A. I think it was on the morning of June 9. That would have been a Tuesday.

Q. What happened then?

A. I received a phone call from Sharon Aldridge who is a paralegal in the [34] Wichita office. At that time, I believe her position was as an assistant paralegal, and she –

Q. Has she been promoted since?

A. Yes.

Q. When was that?

MR. RUPE: We've agreed on a protective order about other employees' information and we'll reduce it to writing, but go ahead and answer the question, if you can.

A. I think it was in March of '99.

BY MR. HOLLIS:

Q. Okay. What did Sharon Aldridge tell you when she called you, I guess, on June 9 of 1998?

A. She wanted to know if I knew what was going on with Dan and the FBI and I didn't know what she was talking about and she indicated to me that on the day before, Dan had come into the office and had a meeting with, I think, I don't know if she told me the FBI or some other law enforcement agency, but he ultimately went to meet with the FBI about someone he had [35] met at a gun show or someone he saw at a gun show the weekend before and that he was going to be going back to the gun show the next weekend and wearing a wire and doing some undercover work for them and she told me that she had tried to get Dan to call me. He was telling her about his activities the day before, what he was going to be doing, and that she asked him if he had talked to me about it and he said no, he wasn't going to talk to me, and she said, "Well, then, you need to at least tell David," and he eventually did call David, she said, and she wanted to know if I had heard about it and I said no, I had not.

* * *

[37] Q. Tell me what you recall of the conversation, first conversation you had with David about Dan's involvement with the FBI.

A. It was sometime shortly after I talked with Sharon. I called and asked him if he knew something about Dan being involved with the FBI and he indicated yes, that Dan had called him and hadn't Dan called me, because he had told him that he should call and let me know and I said no, I hadn't heard anything from Dan, just from Sharon, and David said that Dan had told him that he had met this individual at a gun [38] show who was going to make some sort of biological weapon and he had immediately brought it to the attention of the FBI and he told them that that was a good show, or words to that effect, and that Dan had told him that they were, that he was still in the process of providing them with the details, and I asked him if he was aware that Dan was going to be attending this gun show the next weekend and wearing a wire or something and he said no, he didn't know anything about that, that that was not mentioned in his conversation with Dan, and then he asked me to call Dan and find out what the deal was.

Q. So your understanding from when you talked with David was that David's first conversation with Dan, Dan said I've talked to the FBI and David said good for you, talk to Cindy about it, and that was about it?

A. Yes.

* * *

[39] Q. Did David mention any concern about the conflict of interest in the first conversation you had with David?

A. Yes.

Q. What did he say?

A. We talked about what might happen if Dan went to this gun show and worked undercover in that capacity wearing a wire. I didn't have good information about what exactly the plan was. We were just speculating about if that's what he was [40] doing, what kind of problem that would pose for our office if this should be a high profile case and Dan were a witness for the government and that kind of information being publicized and then clients of our office learning that one of our investigators was working for the government and developing a case against someone else.

Q. This is what David said?

A. It was just a conversation that we had. I don't remember who said what part of it. We were just talking about the possibility of what could result from it.

Q. And the concern was if it became a high profile case, that it came out in the papers that one of your investigators was a witness for the government, that was a concern?

A. Yes.

Q. And what was the concern about it coming out in the papers that way?

A. That it would be known. Most of the clients that the Wichita office represents, or a large percentage of the

clients that the Wichita office represents [41] are located in Wichita and there was just concern that they would know that the investigator that they are confiding in, that's working for them, in fact, is working for the other side which is what they always accuse us of doing anyway; that it would just defeat the trust or confidence that those clients have in us.

* * *

[43] A. Well, that David told me to call Dan and find out what exactly he was planning to do since that wasn't something that he had communicated to David.

Q. Okay. Then what did you do?

A. I called Dan and asked him about it.

Q. Okay. Tell me what you recall of that conversation.

A. I remember Dan telling me in some detail, kind of got lost in it, about this person that he had met at the gun show. It wasn't someone he had just met. It was someone that he had known over a couple of years from seeing him at gun shows and they kind of established some dialogue with each other about this manufacturing of biological weapons. They had a common interest, he said, and this guy had some materials that he had purchased from him in the past and when he stopped and visited his booth at [44] this gun show, he thought the guy was targeting someone, that he was angry at someone and was making noise about actually making one of these biological weapons and began telling me about that anthrax is something that's found in nature, and that was where I really got lost because it went right over my

head. It wasn't something I was familiar with. He said that he was concerned about it so first thing Monday morning, he went to see Dennis Laughrey who is an ATF agent. He said Dennis referred him to the FBI and that he ended up meeting with an agent, I believe Paul Vick, and that they had discussed there was another gun show coming up this weekend in Wichita that the guy was planning on attending and that they were discussing some possible scenarios that Dan might be able to do to kind of set this guy up.

Q. Okay.

A. Dan said some of these things were his suggestion such as he had offered to wear a wire and go let them listen to the conversation that he was having with him. [45] He said another possibility that he suggested was that he didn't think that the guy had the money to finance the manufacture of this biological weapon and that Dan had a $50,000 CD that he offered to use. He told the FBI he would take it and show the guy so he would be willing to help him with what he needed to get it done, but he didn't – they hadn't really decided what they were going to do. They just knew they were going to do something that next weekend.

* * *

[48] Q. Then what was the next conversation you had with someone about Dan?

A. Dave. I then called Dave back and indicated to him that Dan had told me his possible involvement was going to be, and Dave's reaction was pretty immediate that, you know, we can't have him work undercover for

the FBI, and that he wanted me to call him back and tell him and he said, "And you tell him that I said that I don't want him having any more involvement with this." I explained to him about the conflict of interest, how this puts our office in a situation of being in conflict with other potential cases, cases that we currently have involving the FBI, the appearance of a conflict because of him possibly being a witness in this case, and let him know that he's not to have anything further to do with it, and I expressed to Dave that I was [49] concerned that Dan wouldn't be amenable to that because when he was describing these events to me, he was pretty eager to do it and he said, well, let him know then that he can do that, but not continue his employment here, so he has an option if he wants to continue to work on this matter with the FBI, then he cannot continue his employment.

* * *

[56] A. I remember I called him back and said that I had talked with Dave and that Dave was concerned and wanted him to understand that this posed a real conflict of interest situation for the office. He was concerned about it because Dan hadn't told him about it and that that left him without the ability to be aware of a potential conflict for the office and to describe to him what we had talked about how that would undermine the confidence of the clients in the agency and I told him that [57] and I told him that he was not to have any more involvement in this investigation, that the FBI had people who are very capable of taking it from there, and that Dave wanted him to let them do their job and to not have anything further to do with it, and that if he, that we knew that he felt very strongly about it and if he wanted to continue

his involvement in that investigation that he would not be able to continue his employment with our agency.

* * *

[61] A. I don't recall if he called me or I called him, but at some point fairly early the next day, we talked and he said that he had thought it over and that he, he said, "I need my job and I know they don't need me to do this, but I really, really want to do it, but I know that I can't," so he said he wasn't going to have any more to do with it and he would let Paul Vick know that.

Q. Okay.

A. And I could tell that he did really, really want to do it so I expressed to him that if he had any change of heart about it that he needed to let me know immediately.

* * *

[62] A. I got a call from Dan sometime that same day.

Q. Which day?

A. Wednesday, the 10th. It was the day that he had called me back and said, "I want to keep my job; I won't have any more to do with this." He called me later on that day sometime and said that he had talked to Paul Vick and that they wanted to know just what he could do, you know. He wanted to find out what his parameters were, what would be over the line. He wanted to be able to go right up to the line and I told him that he was out of it, that there was nothing more that he could do on that case, that was the parameter, and to recall, [63] you know, what our instructions were to him, that if he did, he

wouldn't be able to still work there and he said okay, he understood, but he told me, "I did promise them that if I had heard from the guy I would let them know," and I said, "No. If you hear from him, you need to let me know and then we'll give you instruction on how to proceed."

* * *

[74] A. I called, returned Dan's call and told him I was sorry I was just getting back to him but that I'd been in this meeting on the Glover case, which he was well aware of of what those were like, and he apologized for bothering me, but that Sharon had told him he needed to call and let me know that there had been some developments in this situation that we had before and I said, "Okay. What are they?" And he indicated to me that there was a gun show coming up that weekend that he was planning, that he was going to and that he was going to meet with this guy, it was going to be under the direction of the FBI, that he was to talk with this person and then he was to page Paul Vick who would be there somewhere and they would get together and decide what to do further, and I said, "How did this all come about?" And he said, "Well, I wrote a letter. They asked me to write him and I did," and I said, "When did this happen?" And he said, "Almost immediately after the [75] situation in June," and I said, "Would you fax me a copy of that letter?" And he said, "I don't have it." I think he indicated he had given a copy of it to the FBI.

Q. Did he say what was in the letter?

A. He wanted – I think he described that they were just wanting to know generally what the guy was up to, if he was still intending to do anything, and I think he

added that he was trying to convince the guy not to do anything.

Q. You mean not to do any mass weapon attacks?

A. Not to make the biological weapon that he had described, and then he said as things got closer that the guy wrote him back and that he was surprised, and so as soon as he got the letter back from the guy, he gave it to Paul Vick and the letter indicated that he was intending to be at this gun show in Wichita that weekend in September and he said as that event approached, things kind of heated up and they had several meetings and I asked him when did this –

[76] Q. Go ahead.

A. Oh, and I also asked him if I could have a copy of the letter the guy sent to him and he said –

Q. Did he indicate what was in the letter?

A. Just that the guy had indicated that he was going to be at that gun show. He may have said that. I don't think he did describe what was in the letter at that time, but they were interested in him meeting with this guy again to see if he was still intending to do anything, and I asked him when did this all start up again and he said about midway between now and the last time, and I asked him how many times, how many meetings have they been having with him and he said probably five or six, and he told me that he had been discussing various levels of protection with them, like different levels of informant protection, maybe even the witness protection program and they said that wouldn't be necessary, that they had read to him the Code Information, I don't know

what that means [77] and I didn't ask him what that meant, and he told me when he made that statement, he said, "As a matter of fact, I am violating that agreement by even telling you this."

Q. What agreement?

A. I don't know what agreement, but he said it at the same time as he was telling me that they had read him the Code Information.

Q. In other words, that the FBI didn't want Dan to tell anyone about his involvement?

A. He said that they had read him the Code Information and that he was violating that agreement and I thought well, he must mean whatever that code was by even telling me about it. Either that or I assume maybe the FBI told him not to be telling us, but that was his statement.

Q. So your understanding was that Dan understood that the FBI didn't want Dan to tell anyone about his involvement?

A. He said "You."

Q. His employer, you?

A. Right, and that's the way I took

* * *

[82] Q. Did you consider whether to tell him, whether to tell Dan he should not go?

A. No. It was irrelevant to me. The part of what he told me that I was concerned about was immediately, he told me that immediately after he'd been instructed not to

do this that he did it and that he continued to do it throughout the summer and then in September brought it to my attention only because Sharon told him he should.

Q. Okay. What was your next conversation with anyone about this [83] situation?

A. It was the next morning, that Friday morning.

Q. With whom?

A. Charles and David.

Q. What do you recall was said in that conversation?

A. We had a telephone conference. I think Charles and I were in Topeka and David was in Kansas City and David wanted to know what was going on and what had happened with Dan and I told him about the conversation I had with Dan and he was unhappy.

Q. What did David say?

A. I don't remember exactly what he said.

Q. Approximately?

A. Immediately in response to my telling him?

Q. What was the gist of what he said?

A. Disbelief, just questioning, you know, why is he doing this, what do we do about it? And I think he sought Charles' and I's position about what should be done.

Q. And you said?

[84] A. I told him at that point I didn't know what else I could do to correct the behavior that I felt like we

implemented back in June, the only corrective behavior that was available, and the only correction that was available was to tell him to discontinue and if there's more involvement to let us know immediately before he did anything. He disregarded that and unless someone had some idea of what else could be done, I didn't see that we had any other option but to terminate him.

Q. Was there any discussion of telling him not to go to the meeting that weekend?

A. No.

Q. The gun show?

A. No.

Q. What else was discussed in that conversation?

A. I think David sought the same position from Charles, asked him what his position was about it and Charles agreed and expressed – I don't know if Charles or David, someone expressed, one of the two, [85] that he just continued by doing this to put us in a position of a potential conflict that we didn't know about and that was a problem for David as head of the agency.

Q. What was the conflict that Charles expressed?

A. I don't know if there was any detailed explanation about what the conflict was. I just, I knew what the conversations were back in June about what the potential conflicts were and I don't think there was any more discussion about what kind of conflict it put us in. We had all those conversations.

Q. So you weren't concerned with Dan going to the gun show that weekend because you thought what he already done was enough to fire him over?

A. Absolutely.

Q. Writing the letter to Tobiason?

A. Meeting five or six times with the FBI, planning the activities of him acting in an undercover capacity.

Q. And writing the letter to Tobiason? That being the first thing that [86] was done, was that enough to fire him over?

A. I don't know if that would have been or not. If he had immediately brought it to our attention, I don't know. That would be speculating. That's not what happened.

Q. Anything else you recall from the conversation on Friday where you talked with Charles and David initially about Dan Rupp's involvement with the FBI?

A. I remember that Dave said that he agreed with the way we felt, that he didn't think he could trust Dan; that no matter what he told Dan, he didn't feel he could trust him to carry it out and he was ready to go to Wichita that afternoon and seek his resignation or terminate him.

* * *

[88] A. At some point Monday morning.

Q. Let me guess. You heard from Sharon?

A. No, I didn't. I think she was too afraid to call me. No, I didn't hear from Sharon. I heard from David or Charles and we – I think David led the conversation and

just asked us if anyone felt differently than the way we left in on Friday and I said No, I didn't, and Charles said he didn't and Dave didn't and so then we just worked out how we were going to go and how we were going to handle that. He conferred with Becky about what he needed to do administratively.

Q. Anything else you recall from that conversation?

A. Just when we were going to meet.

Q. Anything else?

A. No.

Q. What was the next conversation you had with anyone about Dan's situation on Monday?

A. Probably in the car on the way down to Wichita.

[89] Q. You rode with –

A. Charles and I rode together to Emporia and we met Dave Phillips at the Turnpike entrance, I think. We grabbed a sandwich and continued to Wichita. We didn't really have any conversation about what had occurred. It was mainly what do we do when we get there; who's going to lead the conversation.

* * *

[110] Q. Now, as part of Mr. Rupp's job for the Federal Public Defender, does he investigate crimes?

A. He doesn't investigate crimes in the way that the law enforcement agencies do.

Q. He investigates the allegations of crimes against the clients of the Federal Public Defenders?

A. Right.

MR. HOLLIS: Objection. Leading.

BY MR. RUPE:

Q. Well, explain what the Federal [111] Public Defender investigators do.

A. Well, we do a lot of things, because with regard to the investigation of allegations, we review the reports that are generated by the law enforcement agency that investigated the case and we look for mistakes that they made and try to exploit those mistakes to the benefit of our client.

Q. And is the goal in that investigation and the defense of somebody charged with a federal crime to create reasonable doubt?

A. Absolutely.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

K. DANIEL RUFF,

Plaintiff,

vs. Case No. 99-2101-WEA

DAVID J. PHILLIPS, in his personal capacity,

Defendant.

VIDEOTAPED DEPOSITION OF PAUL W. VICK, a witness, taken on behalf of the Plaintiff, pursuant to Subpoena, on the 16th day of August, 1999, at the United States Department of Justice, District of Kansas, 500 State Avenue, Suite 360, Kansas City, Kansas, before

MYLES A. MEGEE,

for AAA Reporting Company, a Registered Professional Reporter, Certified in Kansas and Missouri.

APPEARANCES

For the Plaintiff:
MR. LEE J. HOLLIS
THE HOLLIS LAW FIRM, PA
5100 West 95th Street, 2nd Floor
Prairie Village, Kansas 66207

For the Defendant:
MR. DWIGHT DAVID FISCHER
HUSCH & EPPENBERGER, LLC
301 North Main, Suite 250
Wichita, Kansas 67202

* * *

[11] A. I appreciated getting the information. I didn't have really any feelings other than documenting the information that he gave me and I was appreciative of the information that he gave. With me also knowing the kind of job that he had with the federal defender's office, we did not want to put him at risk with regard to his job. We did discuss options on how he could be of further help to us. I do believe we discussed the option of being a cooperating witness where – that's a term that we use where a person can be used to testify later. That person may volunteer to be wired up and discuss things with a person that we have an interest in. And that would then necessitate the person eventually having to testify. Dan, if I [12] remember right, told me on the day that he provided the information to us that he did tell his boss or bosses about the fact that he was coming to our office with this information, and at the time I don't believe that his office had a concern with regards to him initially disseminating this information to us, but they did ask him not to become further involved with regards to having to testify because it would be a conflict of interest. So we – our office honored that request. We have a lot of people that provide information to us in the private and business sector, and we open people up as a confidential source to document information such as Dan provided us and we had the intention of using additional information that he would provide to us on a confidential basis and it would be written up in such a way that he would not be identified and that he would not have to testify in court.

* * *

[30] Q. (By Mr. Hollis) is it a federal crime to develop and threaten the use of weapons of mass destruction?

A. It's a federal crime to generate biological agents and then use them to threaten or kill or harm people. It has to be a combination of [31] both. If a person just develops a virus or something that's harmful, if it's not coupled with a threat or an actual act or an attempt – you know, some kind of a threat or an action, it's not against the law.

* * *

[34] Q. With a confidential source such as Mr. Rupp – well, let's just talk about Mr. Rupp specifically. You directed him to keep the information that you shared between the two of you confidential; correct?

A. Yes.

Q. From whom was he supposed to keep that confidential?

A. I asked him to keep it confidential from anybody.

Q. Including his employer?

[35] A. I didn't specifically say who he should not talk about, but I just told him that if he was going to provide us information, it would be best – we tell all of our sources to keep it confidential from everyone that they're providing information to us.

Q. And everyone would include his employer; correct?

A. Yes.

* * *

[39] Q. You previously discussed the fact that you had met Mr. Rupp at some criminal trials or a criminal trial; is that correct?

[40] A. Yes.

Q. What was your role in that trial?

A. I was the case agent.

Q. Meaning that you investigated the individual that was on trial?

A. Yes, individuals.

Q. And for whom were those investigations conducted?

A. What do you mean, for whom?

Q. They were on behalf of the U.S. attorney?

A. Yes.

Q. And you're aware that Mr. Rupp is an investigator; correct?

A. Yes.

Q. Are you aware of who he investigated for?

A. Yes.

Q. And who did he do investigations for?

A. Are you talking specifically on this one trial or –

Q. As an employment – during the time you had this relationship with him or this contact with him.

A. For the federal – federal public defenders.

Q. Are you familiar with what the role of the federal public defender is?

A. Yes.

[41] Q. What is it, in your understanding?

A. They provide legal assistance to defendants that are charged that can't otherwise afford a private attorney.

Q. And these are individuals oftentimes who the FBI has investigated on behalf of the U.S. attorney?

A. Yes.

Q. And the U.S. attorney is prosecuting these individuals; correct?

A. Yes.

Q. And the federal public defender is charged with defending the individuals; correct?

A. Yes.

Q. Sc oftentimes or generally you're on opposing sides from the federal –

A. Yes.

Q. – public defender; correct?

A. Yes.

* * *

[45] Q. Do you feel the FBI was capable of investigating Mr. Tobiason without the assistance of Mr. Rupp?

MS. KARLIN: Objection. It's outside the scope, instruct him not to testify.

A. Prefer not to answer that.

Q. (By Mr. Fischer) The FBI is a government agency; correct?

A. Yes.

Q. And you have offices throughout the United States; correct?

A. Yes.

Q. Approximately how many full-time employees does the FBI have? Do you know?

A. 27,000, I think.

Q. And offices throughout the United States?

A. Around the world, yes.

Q. Around the world. Do you have any idea what the FBI's annual budget is?

A. I would not want to make a guess, but it's in [46] the billions.

* * *

[50] A. My boss attempted to sit down with Mr. Phillips and explain the difference if he had a question as the difference between a cooperating witness and a confidential sourse [sic], and it's my understanding that Mr. Phillips declined to meet with my boss on that matter.

Q. Are you aware that that proposed meeting [51] occurred approximately 3½ months after your contact with Mr. Rupp initiated?

MR. HOLLIS: Go ahead.

A. Yes.

Q. (By Mr. Fischer) So at no time in the intervening time between June 8th and September 23rd did anyone from your office attempt to explain that to the federal public defender; is that correct?

A. No, because we didn't have a need to do that.

Q. From the FBI's perspective, you had no need to do that; correct?

A. Yes.

Q. So based on your involvement with Mr. Rupp in this investigation – let me strike that. Based on the arrangement that you made with Mr. Rupp at the beginning of his involvement with this investigation, you were proceeding under the assumption that you would be able to continue with any investigation and potential prosecution of Mr. Tobiason without the assistance of Mr. Rupp?

A. Yes.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

K. DANIEL RUPP,

Plaintiff,

vs. Case No. 99-2101-WEA

DAVID J. PHILLIPS,
in his personal capacity,

Defendant.

VIDEOTAPED DEPOSITION OF WILLIAM R. SECK, a witness, taken on behalf of the Plaintiff, pursuant to Subpoena, on the 16th day of August, 1999, at the United States Department of Justice, District of Kansas, 500 State Avenue, Suite 360, Kansas City, Kansas, before

MYLES A. MEGEE,

for AAA Reporting Company, a Registered Professional Reporter, Certified in Kansas and Missouri.

APPEARANCES

For the Plaintiff:
MR. LEE J. HOLLIS
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5100 West 95th Street, 2nd Floor
Prairie Village, Kansas 66207

For the Defendant:
MR. DWIGHT DAVID FISCHER
HUSCH & EPPENBERGER, LLC
301 North Main, Suite 250
Wichita, Kansas 67202

* * *

[8]Q. What – I don't know exactly how to word this. What is the purpose of the FBI or does the FBI have a mission statement or something of that sort like a lot of organizations do?

A. Well, gosh, I don't know about a mission statement. I mean, primarily we're hired to do two things and that's to collect facts and evidence, and we do those on a very broad spectrum of investigations that are dictated by laws that are on the books and we enforce those. We take those facts and evidence to the United States Attorney's office for prosecutive opinion in most cases and that's what – that's what our mission is.

Q. Okay. And so the FBI is a government agency; [9] correct?

A. That is correct.

Q. And as a government agency, your purpose is to serve as law enforcement; correct?

A. That's correct.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

K. DANIEL RUPP,

Plaintiff,

vs. No. 99 2101 GTW

DAVID J. PHILLIPS,
in his personal capacity,

Defendant.

VIDEOTAPED DEPOSITION OF DAVID J. PHILLIPS, the Defendant, taken on behalf of the Plaintiff, pursuant to Notice on the 14th day of June, 1999, at the law offices of HUSCH & EPPENBERGER, LLC, 7111 W. 98th Terrace, Overland Park, Kansas, before:

CAROL HAGGERTY

of AAA Reporting Company, a Notary Public of the State of Kansas.

APPEARANCES

For the Plaintiff:
MR. LEE J. HOLLIS
THE HOLLIS LAW FIRM, PA
5100 West 95th Street, 2nd Floor
Prairie Village, Kansas 66207

For the Defendant:
MR. ALAN L. RUPE
HUSCH & EPPENBERGER, LLC
301 N. Main, Suite 250
Wichita, Kansas 67202

Also Present:
Ms. Stacia Gressel
Mr. K. David Rupp

* * *

[7] Q. When did you first hear that Dan Rupp was talking to the FBI?

A. It was in June of 1998, I believe.

Q. What did you hear?

[8] A. I heard that he had met an individual at a gun show, that Dan felt that individual possibly could be dangerous, that Dan decided to discuss the matter with the FBI. I also heard that either Dan or the FBI had suggested that he wear a tape recorder to tape this individual at a gun show. And that's the essence of what I heard.

Q. From whom did you hear this?

A. I believe I first heard it from Cindy McNorton.

* * *

[10] Q. What did you tell Ms. McNorton after she told you that she had been approached by Dan Rupp and they had discussed this person with whom he had been talking at the gun show?

A. As I recall, I told Ms. McNorton that she should commend Dan for having initially told the FBI that there was a dangerous character at a gun show that he had met. I told her that I felt that his continued investigation of this matter should not continue. Because of the fact that we represent criminal defendants, I believed that there was, in fact, a conflict of interest by assisting the FBI in

what I considered to be an undercover capacity. And I asked her to tell him not to do it. I believed that the FBI had professionals who could investigate matters much better than Dan.

Q. Why did you commend Dan for having initially told the FBI about the gun show?

A. I felt it is proper when someone learns of someone who is talking of possibly committing a [11] crime that they alert the authorities to that individual.

* * *

[13] A. She told him that I had told her that I felt his continuing in the investigation would be a conflict of interest and that he should not do so, and that if he wanted to do so that his job would be in jeopardy. She told me that Mr. Rupp thought about it overnight and then called her back and said that he wanted his job, that he believed that there were other people that could do the job for the FBI, and that he would not participate any further in the activities with the FBI in this investigation.

* * *

[20] Q. After June of '98 when did you first hear about the issue of Dan and the FBI?

A. It was either the 9th or 10th of September.

Q. What did you hear then?

A. I heard that soon after Dan promised not to be [21] involved any further with the investigation of this individual that the FBI had contacted Dan and wanted his further involvement, that Dan felt if they asked him to do that, he needed to do so, that he wrote the individual a

letter at the direction of the FBI, that there was correspondence over the summer between Dan and this individual, that Dan met with the FBI approximately six to seven times during that summer concerning this matter, and that Dan planned to attend a gun show, I believe it was September 11, where the FBI wanted Dan to have a conversation with this individual again.

Q. From who did you hear that?

A. Cindy McNorton.

Q. When did you hear that?

A. It was either the 9th or 10th of September.

* * *

[23] Q. What were the opinions, if any, voiced by anyone else with whom you spoke about the issue of terminating Mr. Rupp?

A. Everybody I talked to believed that it was a flagrant violation of what Dan had been instructed to do by us. He had told us that he wasn't going to be involved further. But I found out later that he had been involved and was continuing his involvement throughout the summer. That, in effect, breached any kind of trust I could have with Dan as far as believing anything he said. I believe it developed a conflict in the office with respect to what we do in representing our clients.

Q. With whom did you speak, then, in terms of consulting with others about the termination of Mr. Rupp?

A. Other than those people that I just mentioned, Dedmon, Cindy McNorton, and Becky Willis, I don't believe that I conversed with anybody.

* * *

[27] Q. That Friday when Cindy told you that Dan was going to another gun show that weekend, or was talking about going to another gun show, was there any discussion of whether Dan should be told not to go to the gun show?

A. I don't recall any discussion that someone should tell him not to go. It was my feeling at that time he had been told already he could no longer be involved in that investigation and that he shouldn't do it. There wasn't any reason to have any additional information.

Q. Well, he had contacted Cindy McNorton to advise her that he was considering going to the gun show that weekend. That's what you were told. Right?

A. I was told that he had a discussion with Sharon Alderich that his birthday was coming up, that he was going to a gun show, that he was going to be contacting this individual again, and that she, in essence, told him he better contact us and let us know what he was going to be doing.

Q. And he did, right?

A. And he did after he talked with her and she told him he better call us.

Q. And he called Cindy that Friday morning. Right?

[28] A. Sometime on Friday.

Q. And that is my question, was there any consideration of advising him whether or not you wanted him to go to the gun show or didn't want him to go?

A. I don't believe we had the discussion of whether we wanted him to or not. I mean it was decided a long time ago that we didn't want him to be involved.

Q. Then why didn't someone get back to him and tell him that?

A. It's my understanding that Cindy was involved in several other matters with our office at that time, and that if she didn't get back with him that is why she didn't get back with him. It wasn't because she thought it was not an important matter.

Q. What was she involved in, as far as you knew at that time?

A. I'm not certain. Cindy is in our other branch office in Topeka, Kansas, and so I'm not aware of the day-to-day cases that she's working on.

Q. Well, from your perspective as you mulled the decision over that weekend did it make a difference to you whether or not he went to the [29] gun show or were you more concerned about what he had already done?

A. As I mulled it over, it really made no difference whether he went to the gun show or not.

Q. Why not?

A. Because I felt he had violated my trust, as I indicated. He had done exactly what he said he would not do. I felt that continuing involvement continued to

create a conflict of interest for our office in representing defendants who are charged with crimes.

* * *

[34] Q. You were concerned that if Mr. Rupp's cooperation with the FBI came to the attention of one of your potential clients, or actual clients, that they would be concerned that you would not be what?

A. That we would not be interested in defending them to the best of our abilities if one of our investigators was actually investigating or assisting in the investigation with the FBI.

Q. And what would have been the harm, just for purposes of argument, if they did feel that way?

A. Well, we have an obligation to defend them to the best of our abilities, and if they feel that we can't – you have to understand that many times clients feel that we may be an arm of the [35] government; in other word, the prosecution. And we battle that battle all the time. If we have one of our own people who is assisting the FBI, it would be vastly detrimental to the representation of that client, if that client learns of it.

* * *

[42] Q. (By Mr. Hollis) Okay. You have been given copies of Exhibit 1 and 4 which are letters purported to have been written by you. Is this what they are?

A. Yes.

Q. They discuss reasons why you decided to terminate Dan Rupp. Correct?

A. That's correct.

Q. Do those letters, Exhibits 1 and 4, present an accurate description of why you decided to terminate Mr. Rupp?

A. I believe so.

Q. Is there anything other than what is in Exhibits 1 and 4 as far as the reasons why you decided to terminate Mr. Rupp that are not discussed in Exhibits 1 and 4?

A. Well, with respect to Deposition Exhibit 1 on [43] the second page –

Q. That's a letter dated September 18?

A. Yes, where we're talking about not observing high standards of conduct so that the integrity and independence of the office are preserved and so that the defendant office reflects the devotion to serving the public defender's clients and the principle of equal justice under the law. Dan's actions were disruptive with respect to our office. As I indicated before, we have dedicated people who are interested in representing clients who are charged with crimes. They have devoted their entire professional lives, many of them, to doing exactly that.

And Dan's actions are directly contrary by his continuing involvement in this investigation, or directly contrary to the mission of our office. And I think it was disruptive not only in case clients learned of his behavior, but it's also disruptive – for instance, Sharon Alderich knew of it, Cindy knew of it, Dedmon knew of it. I think it was disruptive to all of us. But other than that, I believe Exhibits 1 and 4 do include the reasons [44] he was fired.

Q. Exhibit 1 does not include the reference that Mr. Rupp's behavior could disrupt the personnel of the office as opposed to clients, and that's what you were saying should have been included?

MR. RUPE: Objection; argumentative, mischaracterization.

A. I believe it is included under No. 1. I was explaining what that, in effect, means. It's basically setting out the mission of our office; and when people do things that are inconsistent with our mission, I feel that they disrupt the running of our office.

Q. (By Mr. Hollis) Was there anything else in Exhibits 1 and 4 that you considered as far as the reasons why you terminated Mr. Rupp, other than what is in Exhibits 1 and 4?

A. Other than what we already commented on and what is in Exhibits 1 and 4, I don't know of any.

Q. Well, I'd like to go over everything, all of the reasons why you decided to terminate Mr. Rupp. And if there is anything other than what is in Exhibits 1 and 4 can you please tell us then?

A. He was terminated because he continued investigating a case for the FBI when he was [45] told he should not do that. He told me or Cindy, one of the two of us, that he would not do that. He agreed with us that other people could do the very investigation that he continued. By doing that he breached any kind of trust that I had in him. There was no way in the future that I would be able to believe anything he said.

Q. That is in the letter, those facts are in the letter. Right?

MR. RUPE: Counsel, you have asked him to explain. He is explaining. Don't interrupt his answer.

MR. HOLLIS: I have not asked him to explain all of the reasons why he decided to terminate Mr. Rupp. I asked him to explain any reasons which are not included in the letters, Exhibits 1 and 4.

A. I believe that the reasons for his firing are included in the letters.

Q. (By Mr. Hollis) Any other reasons that are not included in the letters?

A. Not that I know of.

Q. Now, was there any disruption of the personnel in the office as a result of Mr. Rupp's [46] cooperation with the FBI?

A. Well, it depends on how you define disruption. With respect to people understanding and believing in what our office does, there was disruption when he continued his investigation and it was later learned that he had continued investigating a case for the FBI.

Q. On what facts do you base that statement?

A. On the fact that the parties involved that I just mentioned, Sharon Alderich, Dedmon, Cindy McNorton, Becky Willis, all of us were aware of what he had done. There may be other people within the office that also were aware of what he had done. As I indicated, the people with whom I discussed this matter, there was

never anyone who failed to see that there was a conflict in what he was doing, and a conflict with respect to the mission of our office, which is basically focused on the representation of our clients.

Q. In what ways did a conflict within the office based on Mr. Rupp's activity manifest itself?

A. The people in the office – I know that he discussed this matter with Sharon. Sharon was disturbed enough to tell Mr. Rupp that if he did [47] not inform us, that she was going to do so. So obviously, her activity was disrupted. It's my understanding that Dan talked to the FBI on at least one occasion in our office. The morning he was fired it's my understanding he took materials that he purchased at the gun show to the FBI office during working hours.

Q. Was that a reason that you fired him?

A. No. But that is the type of activity that is disruptive to the office.

Q. Have you finished your answer about what facts you base the conclusion that there was disruption in the office? You told us about Sharon Alderich feeling that she had to report the issue. Any other facts on which you base the conclusion that there was disruption?

A. I mentioned all of the people that I had discussed it with within the office. Obviously it disrupted their being able to perform other duties, worried about what Dan was doing.

Q. On what do you base that statement?

A. Because I know Cindy spent time discussing that matter with me and with Charles. I discussed it with both of them.

* * *

[48] Q. Was Mr. Rupp asked to sign a letter of resignation?

A. He was given the choice of either signing a letter of resignation or being fired.

* * *

[50] Q. After you arrived in Wichita the Monday afternoon when you terminated Mr. Rupp, what transpired then?

A. I have an office at the far end of that office complex, and as I recall we went into that office and then one of us asked Mr. Rupp to come into the office.

Q. Before that happened had you had any discussions with anyone about Mr. Rupp's activities?

A. I don't recall talking to other employees. Someone in my office may have called and asked that – well, just notifying them what was going on.

Q. So at that point you didn't even know whether Mr. Rupp had been to the gun show that weekend?

A. That's correct.

Q. Did it matter to you?

A. No.

[51] Q. Why not?

A. Because I felt that he had breached my trust. He had told me absolutely that he was not going to do that anymore – have any more involvement. He told me that other people with the FBI could do the investigation and that they did not need him to do that, and he immediately after that was in contact with the FBI again. They asked him to write a letter, as I understand it. He did that. He had five or six meetings throughout the summer of which I was not aware, that he did not tell us about. There was no way I could trust the individual any more, and I felt he needed to be terminated, in addition to the other reasons that I mentioned.

Q. You called Mr. Rupp into the office, and tell me what you recall of that meeting.

A. As I recall, Dan came in and I said something to the effect that I assume you know why you are here. Dan commented that he did know why he was there. He was apologetic and said he was sorry. I told him he had placed me in a situation that I had nothing that I felt I could do other than terminate him under the circumstances.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

K. DANIEL RUPP, Plaintiff,	)	
vs.	)	Case No. 99 2101 GTV
DAVID J. PHILLIPS, in his personal capacity, Defendant.	)	

Deposition of CYDNEY GILMAN, taken by the Plaintiff, K. Daniel Rupp, before me, Janelle E. Goddard, a Certified Shorthand Reporter within and for the State of Kansas, at 301 North Main, Suite 1400, Wichita, Sedgwick County, Kansas, commencing at 11:20 a.m. on the 10th day of August, 1999.

* * *

[11] Q. When did his involvement with the FBI with respect to Tobiason first come to your attention?

A. June the 9th of 1998.

Q. How did it come to your attention?

A. He came to my office, and my recollection of some of the details of what he told me is not excellent, but I would say it revolved around him saying that there was a man at a gun show that he believed could be making I believe it was explosives but I'm not even sure. Some kind of unlawful device that could be dangerous and wanting to work with the FBI in setting this guy up.

I immediately told him that although I couldn't speak for other people at the office, I thought that that was a

horrible conflict of interest for him to be doing – actively setting someone up for what would be a federal charge. It was the FBI who was a federal organization that we work against every day with our clients, and I told him that if our client community knew that one of [12] our employees of our office was actively working with the FBI, one of our adversaries, to set up our – to set up a potential defendant in a federal criminal case, that would destroy any credibility that we would have with our client community.

I also told him that I thought if he did he would very likely lose his job and that I didn't want him to lose his job, that we all liked him and cared about him. I also told him after my years of experience in working with law enforcement agencies and their work with people that help set up people that he was by far not the only person that could accomplish that task. I told him, Dan, the FBI is one of the most powerful federal agencies in law enforcement that there is. They can pull upon resources you can't believe to get other people that can do this to set somebody up but it shouldn't be you. I told him he needed to call Cindy McNorton about this. I thought it was such a serious issue of conflict that I called Cindy myself to make sure that he had called her. I also called David Phillips that day. And I do have my [13] time sheets to reflect that this is the day this happened and the people I talked to.

* * *

[31] Q. Did you ever tell anyone you wouldn't be able to trust Dan after this?

A. Yes. I – you know, after Dan was terminated, there was going to be another hearing, some kind of administrative hearing with the higher-ups of our office, and I remember expressing that what he did was so – and what he had proposed to do when I talked to him was so against what our office does and could have created such distrust for our whole office – if our client community would have learned about that, it would have been all over, and I remember thinking if for some reason they let [32] him back, I don't know how I'm going to do my job because I'm not going to be using him as an investigator.

Q. Why not?

A. Because I couldn't trust him to know that he knows the difference between what is defending a person who is charged with a crime and what is going and setting somebody up for a crime. It so put my trust in his judgment in a deteriorated state that I thought I'm not going to be able to have an investigator unless they hire somebody else.

* * *

Office of the
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DAVID J. PHILLIPS
Federal Public Defender

CHARLES D. DEDMON
First Assistant Federal Public Defender

September 18, 1998

Dan Rupp
999 N. Silversprings Blvd., #416
Wichita, KS 67212

Dear Dan:

During our meeting on September 14, 1998, you tendered your resignation from your employment with this agency effective September 25, 1998. This letter is to memorialize the reason your resignation was requested.

As indicated during the meeting, you were counseled in June, 1998, concerning your activities with the FBI in investigating an individual. You advised us in June that prior to notifying anyone in this agency, you had provided the FBI with information about the activities of a certain individual you believed to be potentially dangerous. With the knowledge and assistance of the FBI you had agreed to wear a "wire", and meet with the individual at a gun show. In our discussions with you at that time, you were commended for bringing the individual to the attention of the authorities. You were told you could

not continue active "undercover" participation in the investigation of the suspect, because such activity would create a conflict of interest with respect to your ability to perform your investigative duties for the office, and also create a real or apparent conflict for the office in representing those accused of doing similar things. You were given the choice of resigning at that time, if you chose to continue your undercover work with the FBI. If you wanted to remain with our agency, you were told to cease all activity related to that investigation. After careful thought you chose to continue your employment with this agency. You agreed to follow my direct instructions to cease further activity with the FBI. You were counseled that in the future, if you came into possession of additional information concerning that investigation, you were to report it to your supervisor, Cindy McNorton. She was instructed to consult me, and as the head of this agency I would advise how to proceed.

On September 10, 1998, at the insistence of a fellow employee in whom you had confided, you advised Ms. McNorton that you had, immediately following our discussions in June, resumed your cooperation with the FBI in investigating the matter you previously reported to them. You said that these activities included writing a letter to the individual at their direction, and participating in 5 or 6 meetings with the FBI over the summer. These meetings were to culminate in a planned contact by you with the suspect at a gun show on the weekend of September 12-13, 1998. None of the aforementioned activities were discussed with me or your direct supervisor prior to your renewed involvement. You specifically had

agreed to have no further involvement with the investigation.

Your action constitutes a breach of trust, and has created an atmosphere wherein you can no longer be trusted to do what you are told, or to keep sensitive information confidential. As discussed with you, the position of investigator requires a high degree of trust due to the confidential and sensitive nature of the information an investigator must possess to carry out the functions of that position. Equally as important, your actions have violated our code of conduct for federal public defender employees by:

1. Not personally observing high standards of conduct so that the integrity and independence of the office are preserved and so that the defender office reflects a devotion to serving the public defender's clients and the principle of equal justice under law. See Canon 1;

2. Engaging in activities that would put into question the propriety of your conduct in carrying out the duties of the office. See Canon 2;

3. Not respecting and complying with the canons, by not reporting to your supervising authority any attempt to induce you to violate the canons, and by not being faithful to professional standards and maintaining competence in your profession. See Canon 3 A and B;

4. Not avoiding conflicts of interest, and by not advising me of your renewed involvement in the FBI investigation when you knew that such could constitute a conflict of interest in the performance of your duties. You should have

observed the restrictions on your activities imposed by me in this regard. See canon 3F.

All employees are to avoid and report at the earliest opportunity any conduct that may undermine the integrity of this agency to the clients we represent. The look of impropriety, i.e. your working as an undercover operative for one of the agencies that routinely investigates the clients that we represent, undermines our integrity with those very clients. You advised Cindy that the FBI told you not to discuss with us your activities on their behalf. In fact, you advised that the FBI told you that discussions with Cindy or others violated some "code" which governs their investigations. On at least one occasion an FBI agent met with you during office hours at our office to discuss the investigation of the individual. On another occasion, the morning of our meeting with you on September 14, 1998, you left our office during office hours to take items purchased or obtained from the suspect over the weekend to the FBI. We do not know if you spent additional office time on this matter. Assisting the FBI in the investigation on office time was unprofessional and improper.

I am satisfied that you made a conscious decision to continue this undercover work with the FBI. This is supported by the explanation you gave me during the course of our meeting. You told me that you recognized, based on our previous discussions, that you were not to engage in this activity, but you felt that if requested by the FBI (an agency that is not your employer) that you were obligated to give your assistance. Your decision could not be a more flagrant violation of your previous statement

that you would not be further involved in the investigation, and left me, in my opinion, no alternative but to ask for your resignation. I regret that your choice was to continue your work with the FBI in spite of my directive to you to terminate that activity. Your actions, as discussed, constitute a breach of trust, and have created a real or apparent conflict of interest for our agency.

This letter constitutes written notice of the reasons for the adverse action taken in your case, in compliance with the termination and grievance procedures of our office.

Sincerely yours,

/s/ David J. Phillips
DAVID J. PHILLIPS
FEDERAL PUBLIC DEFENDER
For the District of Kansas

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DAVID J. PHILLIPS
Federal Public Defender

CHARLES D. DEDMON
First Assistant Federal Public Defender

October 2, 1998

Mr. Richard Ney, Attorney At Law
2225 N. Market, Suite 100
Wichita, KS 67202

Re: K. Daniel Rupp

Dear Mr. Ney:

This letter constitutes my written decision regarding Mr. Rupp's adverse action hearing. In summary, and as will be detailed below, I must regretfully inform you that my decision is to confirm the adverse action previously taken, which will make Mr. Rupp's termination of employment final.

Two general reasons were provided in my September 18, 1998 letter to Dan. First, there was the conflict of interest question and second, there was the breach of trust and failure to follow agreed instructions with reference to my perception of the conflict issue. The two issues are multi-faceted and intertwined, and, as a factual matter, essentially uncontested.

In June of 1998, this matter first came to my attention. There had been discussion between Mr. Rupp and F.B.I. agents about a person Dan had met at a gun show. Dan expressed his concerns to the F.B.I., advising them that the man's disgruntled nature and expertise in deadly gases were alarming. The F.B.I. took note and wanted to enlist Mr. Rupp's further support, asking him to maintain contact, report those contacts, and to be fitted with a "wire", so that the contacts would be recorded. After some hesitation, he reported these developments to Ms. McNorton and to me.

He was instructed by Ms. McNorton to discontinue further actions with the F.B.I. He was told that I deemed his course of action in alerting the F.B.I. commendable, but that given the adversarial role of a public defender office, further action on his part in this regard would be forbidden.

Mr. Dedmon also spoke with Dan. He, like Ms. McNorton and myself, discussed the difficulty we often have gaining the trust of clients, who believe that we, as a federal agency, are not really independent of the prosecution. Mr. Dedmon told Mr. Rupp that if it came about that people on our staff were known to be working in a continuing informant capacity, that would damage our institutional integrity. Mr. Rupp expressly agreed to refrain from further involvement, and was aware that such involvement could result in his termination.

Mr. Rupp now suggests that he believed only he could assist the F.B.I. in obtaining further information from and about the individual, and that he had no obligation to obey an order which would possibly cause thousands to

die ghastly deaths. A book, with grisly photographs, was presented at the hearing to support Mr. Rupp's grave concerns.

I find, however, that Mr. Rupp was not the only person who could assist the F.B.I. That agency conducts such investigations constantly. Dan admitted he was not essential to the investigation in June of 1998. However, when asked to continue a series of surreptious communications with the target of the investigation, at the behest of, and under the direction of, the F.B.I. Mr. Rupp readily agreed. Mr. Rupp, despite unmistakably clear instructions from Ms. McNorton to call for instructions even if incidental follow-up contact occurred, instead withheld his subsequent written communication to the target and the five or six F.B.I. meetings concerning future contacts with the target from everyone in the agency. Instead of desisting from this situation, he delved more deeply into it, even to the point of asking the F.B.I. about possible enlistment in the Witness Protection Program, which, as he must be aware, applies to an informant whose identity has become known.

Significantly, Mr. Rupp totally agreed to Ms. McNorton's, Mr. Dedmon's and my own parallel orders regarding the propriety of future intentional contacts, and the need to promptly report future unintentional contacts, or unforeseen developments. Mr. Rupp agreed without reservation. He did not express doubt over the legality of his orders, or take action to address unexpressed disagreement through the available grievance procedure. Instead, he was explicit in his agreement. he was advised that a decision by him to continue in disregard of our agreed action would lead to immediate termination.

Mr. Rupp now argues that he had, and has, an absolute right to do as he did. Yet no such argument was made in June of 1998, when it could have been addressed without imperiling his job. Mr. Rupp told us that "I felt compelled to do whatever they asked". "They" refers to F.B.I. Agent Vick. This position was kept secret from our office. Only an inadvertent statement by Mr. Rupp led to discovery of the situation.

It is not lightly that I come to the conclusion to make Mr. Rupp's termination final. Yet the situation created by his covert F.B.I. activity is intolerable. We had an employee with access to all of our confidential documents having secret meetings with the F.B.I. against not only my explicit order, but also his own promise, made in seeming sincerity, but not in good faith. It is among the most serious category of employee misconduct with which I have been presented, and placed at risk is the institutional integrity of the entire office. When combined with the willful and deceptive nature of the events, it is not possible to reverse the earlier decision. Accoringly [sic], the discharge of K. Daniel Rupp is affirmed and final.

Sincerely yours,

/s/ David J. Phillips
DAVID J. PHILLIPS
FEDERAL PUBLIC DEFENDER
For the District of Kansas

DJP/dmr

COPY OF TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

K. DANIEL RUPP,

Plaintiff,

Case No. 99-2101-WEA

vs.

DAVID J. PHILLIPS, in his personal capacity,

Defendant.

DEPOSITION
OF
CHARLES DEDMON,

taken on behalf of the Plaintiff, pursuant to Notice to Take Deposition, beginning at 12:50 p.m., on the 16th day of July, 1999, at the Capitol Plaza Hotel, 1717 Southwest Topeka Boulevard, in the City of Topeka, County of Shawnee, and State of Kansas, before Susan J. Morris, Certified Shorthand Reporter.

* * *

[73] Q. Was there ever any actual disruption of the Defender's Office as a result of Dan's activities?

A. Yes, I'd say so.

Q. What was that?

[74] A. In June, of course, we had to take time to resolve the question. That really wasn't that disruptive though because it was dealt with, and in September, I had very little time to devote to anything other than the capital case and the cases that I had that I couldn't get out

of that moved on a fairly quick deadline in federal court. Some were very important and were being tried as the capital case was going on. Cindy was involved with trying to understand how to coordinate the numerous investigative functions and paralegal functions. We were trying to learn how to make sure that we had the documents collected correctly and tabbed correctly so we could find them quickly. We were writing the second wave of what turned out to be many, many motions, probably 150 motions including memoranda, and this took our attention from that.

Q. That this what?

A. This recurrence of activity, this, the report from Dan to Cindy that he was still communicating with the FBI disrupted me from what I was doing.

[75] Q. Any other disruption?

A. I think people in Wichita were, I say people, I think Cyd Gilman in Wichita was distressed that Dan was having communications with the FBI without letting anybody know about, without letting anybody know and she expressed some concern in using him as an investigator.

Q. Anything else in terms of disruption?

A. We had used Dan on the capital case as a matter of necessity because he's down in Wichita. Because of that, there were going to be times when we needed to have somebody do something immediately in Wichita and Dan would be the most natural person to respond. I wouldn't have used him in sensitive matters so he became unavailable as far as I was concerned. Once I found out there was resurgence of contact, as far as I was

concerned, he was not available. We had to freeze him out of that case, even if Dave had not decided to discharge him, so I think that was a disruption, but of a brief duration.

[76] Q. Why would you have felt he couldn't, Dan couldn't be used?

A. Because if he's saying he's not having contact with the FBI and he's having direct contact with the FBI in a case in which we're going tooth and nail against people in the exact office, I don't know what else he's not telling me the truth on. It may be in some cases I could take that risk, but you can't take any risk in a capital case.

Q. Of course, he did come forward and tell about the contact, didn't he?

A. Well, yeah, he did.

Q. Did that make any difference to you?

A. No, it really didn't.

Q. Why not?

A. Because he came forward and divulged that he had been having continued contact with the FBI when he promised he would not and he also promised he would talk to us before he did and so he was committing a breach of faith. That's a bell you can't unring.

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FEDERAL PUBLIC DEFENDER
DISTRICT OF KANSAS

[LOGO]

PERSONNEL POLICIES AND PROCEDURES MANUAL

David J. Phillips
Federal Public Defender
District of Kansas

Revised: August 1998

PERSONNEL POLICIES AND PROCEDURES MANUAL

Federal Public Defender, District of Kansas

This manual is intended to provide a written guideline of personnel benefits and responsibilities as well as clear definition of general office policies.

The contents of this manual are intended solely as a guide. Where applicable, the reference authority is cited. In the event of any contradiction between this manual and any statutory authority or rule guideline issued by the Administrative Office of the United States Courts or other appropriate regulating authority, that statutory or regulating authority controls.

The language used in this manual is not intended to constitute or create, nor is it to be construed to constitute or create, the terms of an employment contract between

the Office of the Federal Public Defender and any of its employees.

The terms and provisions contained herein are subject to change upon notice. Please notify me of questions concerning the information herein.

Revised: August 1998

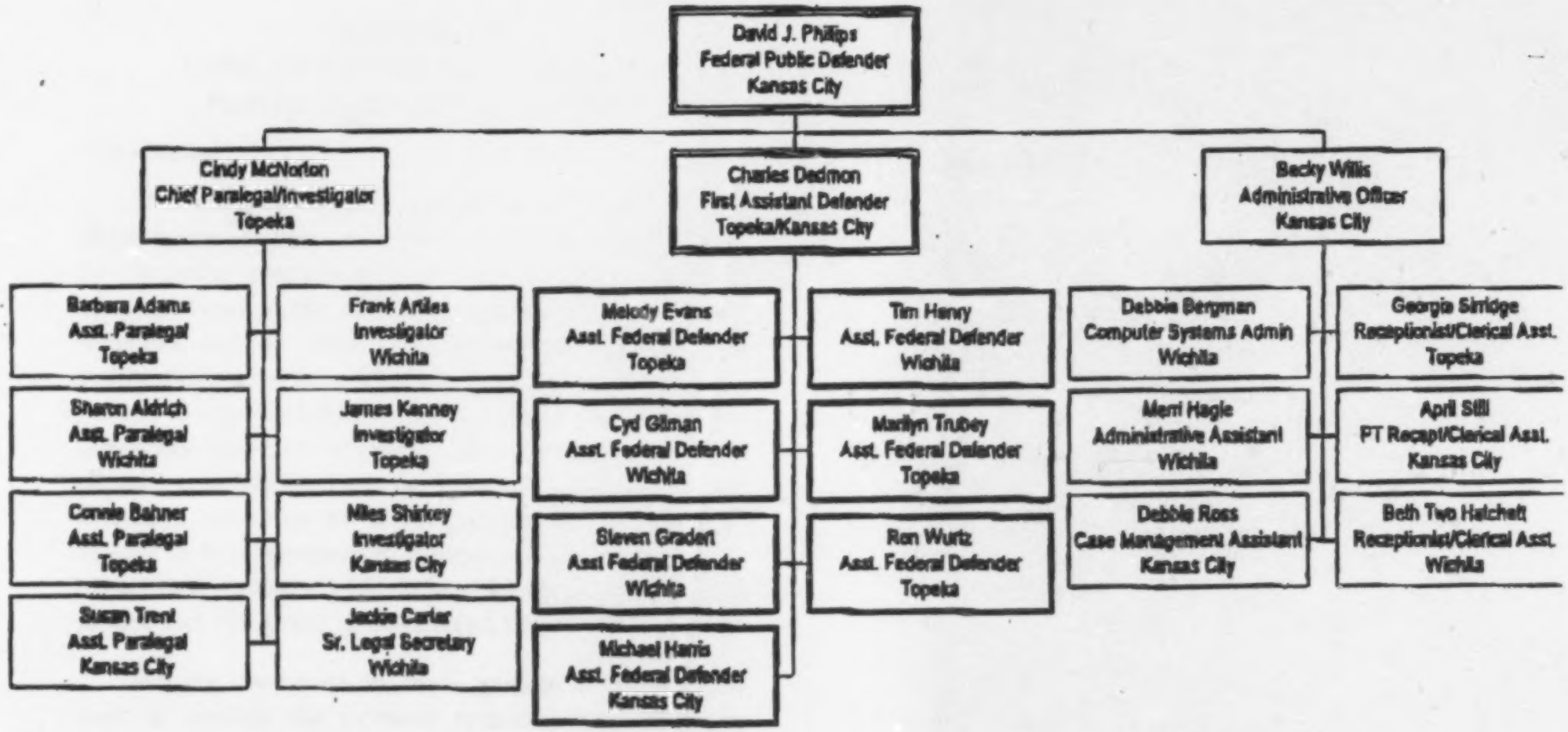
DAVID J. PHILLIPS
FEDERAL PUBLIC DEFENDER

FEDERAL PUBLIC DEFENDER, DISTRICT OF KANSAS

PURPOSE AND ORGANIZATIONAL STRUCTURE

This office exists to ensure that the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act, and other congressional mandates is enforced on behalf of those who cannot afford to retain counsel and other necessary defense services.

Every accused person, regardless of the alleged crime or offense, is entitled to zealous representation.



- **Charles Dedmon, First Assistant Federal Defender:** team leader for all attorneys in the office.
- **Cindy McNorton, Chief Investigator/Paralegal:** team leader for all of the paralegals, investigators and legal secretaries in the office.
- **Becky Willis, Administrative Officer:** team leader for the administrative, systems and office support staff.

BEST AVAILABLE COPY

August 1998

CHAPTER SIX
CODE OF CONDUCT FOR FEDERAL PUBLIC DEFENDER EMPLOYEES

Introduction:

This code of conduct applies to all federal public defender employees.[1] As used in this code, "federal public defender employees" (or "defender employees") means federal public defenders, assistant federal public defender, and all other staff employees of the federal public defender office. "Public defenders" means only the federal public defenders and assistant federal public defenders. This code of conduct does not apply to private counsel appointed under the Criminal Justice Act, or to attorneys provided by a bar association or legal aid agency or by a community defender organization established in accordance with the provisions of the Criminal Justice Act (18 U.S.C. § 3006A(g)(2)(B)).

Nothing contained in these canons is intended to limit or modify the primary responsibility of public defenders, as appointed counsel, to render effective legal representation to clients as required by the Constitution and laws of the United States and by applicable rules governing professional conduct, including the codes of professional responsibility applicable in the jurisdiction in which the public defender practices.

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[1] When Actually Employed (WAE) employees are subject to cannons 1, 2, and 3 and such other provisions of this code as may be determined by the appointment authority.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions concerning the application and interpretation of this code. Defender employees (other than the federal public defender) should consult with the federal public defender, and the federal public defender may consult with the court of appeals, for guidance on questions concerning this code and its applicability before a request for an advisory opinion is made to the Committee on Codes of Conduct. In assessing the propriety of one's proposed conduct, a defender employee should take care to consider all relevant canons in this code, the Ethics Reform Act, and other applicable statutes and regulations[2] (*e.g.*, receipt of a gift may implicate canon 2 as well as canon 5C(2) and the Ethics Reform Act gift regulations). Should a question remain after this consultation, the affected defender employee may request an advisory opinion from the Committee. Request for advisory opinions may be addressed to the Chairman of the Committee on Codes of Conduct in care of the General Counsel, Administrative Office of the United States Courts, One Columbus Circle, N.E., Washington, D.C. 20544.

Adopted September 19, 1995 by
the Judicial Conference of the
United States
Effective January 1, 1996

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[2] *See the Guide to Judiciary Policies and Procedures*, Volume II, Chapter VI, Statutory and Regulatory Provisions Relating to the Conduct of Judges and Judicial Employees.

CANON 1: A FEDERAL PUBLIC DEFENDER EMPLOYEES SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE OFFICE

An independent and honorable defender system is indispensable to justice in our society. A defender employee should personally observe high standards of conduct so that the integrity and independence of the office are preserved and so that the defender office reflects a devotion to serving the public defender's clients and the principle of equal justice under law. Defender employees should require adherence to such standards by personnel subject to their direction and control. The provisions of this code should be construed and applied to further these objectives. The standards of this code shall not affect or preclude other more stringent standards required by law, by applicable codes of professional responsibility, by court order, or by the federal public defender.

CANON 2: A FEDERAL PUBLIC DEFENDER EMPLOYEE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A defender employee should not engage in any activities that would put into question the propriety of the defender employee's conduct in carrying out the duties of the office. A defender employee should not use public office for private gain.

CANON 3: A FEDERAL PUBLIC DEFENDER EMPLOYEE SHOULD ADHERE TO APPROPRIATE STANDARDS IN PERFORMING THE DUTIES OF THE OFFICE

In performing the duties prescribed by law, by resolution of the Judicial Conference of the United States, by court order, or by the federal public defender, the following standards apply:

A. A defender employee should respect and comply with the law and these canons. A defender employee should report to the appropriate supervising authority any attempt to induce the defender employee to violate these canons.

Note: A number of criminal statutes of general applicability govern defender employees' performance of official duties. These include:

18 U.S.C. § 201 (bribery of public officials and witnesses);

18 U.S.C. § 211 (acceptance or solicitation to obtain appointive public office);

18 U.S.C. § 285 (taking or using papers relating to government claims);

18 U.S.C. § 287 (false, fictitious, or fraudulent claims against the government);

18 U.S.C. § 508 (counterfeiting or forging transportation requests);

18 U.S.C. § 641 (embezzlement or conversion of government money, property, or records);

18 U.S.C. § 643 (failing to account for public money);

18 U.S.C. § 798 and 50 U.S.C. § 783 (disclosure of classified information);

18 U.S.C. § 1001 (fraud or false statements in a government matter);

18 U.S.C. § 1719 (misuse of franking privilege);

18 U.S.C. § 2071 (concealing, removing, or mutilating a public record);

31 U.S.C. § 1344 (misuse of government vehicle);

31 U.S.C. § 3729 (false claims against the government).

This is not a comprehensive listing but sets forth some of the more significant provisions with which defender employees should be familiar.

B. A defender employee should be faithful to professional standards and maintain competence in the defender employee's profession.

C. A defender employee should be patient, dignified, respectful, and courteous to all persons with whom the defender employee deals in an official capacity, and should require similar conduct of personnel subject to the defender employee's direction and control. A defender employee should diligently discharge the responsibilities of the office in a nondiscriminatory fashion.

D. A defender employee should not solicit or accept a payment of money or anything of value from a client, except that a defender employee may accept an appropriate memento or token that is neither money nor of commercial value. A defender employee should never disclose any confidential communications from a client, or any other confidential information received in the course of official duties, except as authorized by law. A former defender employee

should observe the same restrictions on disclosure of confidential information that apply to a current defender employee.

E. A defender employee should not engage in nepotism prohibited by law.

Note: See also 5 U.S.C. § 3110 (employment of relatives); 28 U.S.C. § 458 (employment of judges' relatives).

Conflicts of Interest.

(1) In providing legal representation to clients, a public defender should observe applicable rules of professional conduct governing the disclosure and avoidance of conflicts of interest.

(2) In the performance of administrative duties, a defender employee should avoid conflicts of interest. A conflict of interest arises when a defender employee knows that he or she (or the spouse, minor child residing in the defender employee's household, or other close relative of the defender employee) might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts would question the defender employee's ability properly to perform administrative duties.

(3) When a defender employee knows that a conflict of interest may be presented in the performance of duties, the defender employee should promptly inform the federal public defender. The federal public defender, after determining that a conflict or the appearance of a conflict of interest exists, should take appropriate steps to restrict the defender employee's performance of duties in such a matter so as to avoid a conflict or the appearance of a conflict of interest. If the conflict involves a conflict between or among

clients, the federal public defender should consider withdrawal from one or more representations, or other appropriate remedial actions, as necessary to comply with applicable rules of professional conduct. A defender employee should observe any restrictions imposed by the federal public defender in this regard.

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